IN THE INCOME TAX APPELLATE TRIBUNAL
[DELHI BENCH: 'I' NEW DELHI]

BEFORE SHRI G. S. PANNU, PRESIDENT
AND
SHRI YOGESH KUMAR U.S., JUDICIAL MEMBER

I.T.A. No. 1976/DEL/2020 (A.Y 2013-14)

DCIT, Central Circle-29Room No. 318, 3rd Floor, E-2, ARA Centre, Jhandewalan Extension, New Delhi **(APPELLANT)**	Vs.	Dharampal Satyapal Ltd. 1711, S.P. Mukherjee Marg, New Delhi **PAN No. AAACD0132H** **(RESPONDENT)**

Assessee by :	**Sh. R. S. Singhvi & Satyajeet Goel, CA**
Department by:	**Shri Vivek Verma, [CIT] – D.R.;**

Date of Hearing	**05.07.2022**
Date of Pronouncement	**02.09.2022**

ORDER

PER YOGESH KUMAR U.S., JM

The present appeal is preferred by the Revenue for the Assessment Year 2013-14 against the final assessment order dated 31/01/2018 passed by the DCIT, New Delhi u/s 144C(4)/143(3) of Income tax Act, 1961,('the Act' for short).

2. The Revenue has raised the following ground of appeal:-

I.T.A. No. 1976/DEL/2020 (A.Y 2013-14)

1. *Whether on the facts & in the circumstances of the case and law, the Ld. CIT(A) erred in law & on facts in deleting addition made by the AO on the account of lesser rate of job work charged from the sister concerns in comparison to other related parties.*

2. *Whether on the facts & in the circumstances of the case and law, the Ld.CIT(A) erred in law & on facts in deleting addition made by the AO on account of disallowance of deduction on account of allocation of interest.*

3. *Whether on the facts & in the circumstances of the case and law, the Ld. CIT(A) erred in law & on facts in deleting the reduction of claim u/s 80IB/80IC of ignoring the fact that the royalty payment @3% which was made to sister concern taken by AO was the rate approved by Regional Director.*

4. *Whether on the facts & in the circumstances of the case and law, the Ld. CIT (A) erred in law & on facts in deleting addition made by AO on account of disallowance on account of upward adjustment in cost of services by the Head Office.*

5. *Whether on the facts & in the circumstances of the case and law, the Ld. C1T(A) erred in law & on facts in deleting reduction of claim u/s 801B/801C made by AO by increasing the value of goods transferred from Noida units to eligible units treating them processed goods and by reducing the 80IB/80IC to that extent.*

6. *Whether on the facts & in the circumstances of the case and law, the Ld. CIT erred in law & on facts in deleting reduction of claim u/s 80IB/IC made by the AO by increasing the value of goods transferred from Silverfoil units to eligible units treating them processed goods and by reducing the 80IB/IC to that extent.*

7. *Whether on the facts & in the circumstances of the case and law, the Ld. CIT(A) erred in law & on facts in deleting addition made by the AO on account of interest received on foreign currency loan.*

8. *Whether on the facts & in the circumstances of the case and law, the Ld. CIT(A) has erred in law & on facts in directing to take the basis of calculation from the lowest purchases from the third party, thus ignoring the facts and evidences of bogus purchases unearthed during the course of search and post search proceedings.*

9. *That the order of CIT(A) is erroneous and is not tenable on facts and in law.*

The appellant prays for leave to add, amend, modify or alter any grounds of appeal at the time or before the hearing of the appeal.

3. Brief facts of the case are that, the assessee company is engaged in the business of manufacture and trade in pan masala, Guthka, Zarda and perfumery compounds and herbs, mouth fresheners, salt and spices, snack foods, natural spring water, composite cans and processing of silver etc. Assessee is also engaged in trading in securities, commodities and units of mutual funds. The manufacturing units of the assessee are located at Noida, Brotiwala and Kullu in Himachal Pradesh, Aggartala, Gawahati and Delhi. In respect of units located at Barotiwala and Kullu at Himachal Pradesh were shown to be eligible for deduction u/s 80 IB/80 IC of theincome tax act. However, on account of net taxable losses on these units deduction has not been claimed in view of the provisions of Section 80IA (5) of the act. The assessee company is also having marketing offices, depot and branch offices

spread across the length and breadth of the country. It has its main branches are Delhi, Ahmadabad, Indore, Lucknow, Bhubneshwar, Patna, Bangalore, Coimbatore, Bhiwandi, Raipur, Kolkata, Ranchi, Haldwani, Noida and Jaipur. Assessee is maintaining separate books of accounts in respect of all these branches however the profit and loss accounts are not being drawn an entire cost is transferred to various units including the units eligible for deduction u/s 80 IB/80 IC of the act based upon the sales ratio of all manufacturing units.

4. During assessment year 2005 – 06 to 2011 – 12 assessment orders were passed under the provisions of Section 153A/143 (3) of the Act based upon search and seizure operations carried out under the provisions of Section 132 of the act on 21/1/2011. A special audit u/s142 (2A) was also conducted for assessment year 2004 – 05 to 2011 –12. The assessment for the assessment year 2004 – 05 to 2011 – 12was passed considering the findings of search of action and report of special audit. Various disallowances under provisions of the income tax act and adjustment to deduction claimed u/s 80 IB/80 IC of the act was made in those orders. The assessee is continuing the same line of business during the year under consideration. Therefore, the finding of the special audit and such actions are also applicable to the facts of the present proceedings also as stated by the learned assessing officer. The appellant is a company incorporated under the provisions of the Companies Act, 1956. During the year under consideration, the appellant was engaged in the business of manufacturing and trading in Pan Masala, Zarda, Perfumery compounds and Herbs, Mouth Freshener, Salt, Spices, Snack food, Natural spring water, Composite cans and processing of silver etc.

5. For the relevant previous year, the appellant filed the return of income on 30/11/2013 declaring total income of Rs. 118,99,98,245/- (after claiming deduction under section 80IC) under normal provisions of the Income Tax Act, 1961 ('the Act'). Since, Minimum Alternate Tax ('MAT') liability tax on book profits under section 115JB of the Act was higher, the appellant paid tax on book profits amounting to Rs 343,04,73,103/- and paid MAT of Rs. 69,91,77,340/-.

6. The case was selected for scrutiny under CASS and notice u/s 143(2) was issue on 04.09.2014. Thereafter assessment was completed at Rs. 192,70,64,162/- under normal provisions by making various additions/disallowances. By way of order u/s 144C(4)/143(3) of the Act dated 31/1/2018. As against the assessment order dated 31/01/2018 the assessee has preferred an Appeal before the CIT(A). The Ld.CIT(A) vide order dated 24/09/2020 partly allowed the Appeal.

7. Aggrieved by the order dated 24/09/2020 the Department of Revenue has preferred the present Appeal.

8. At the time of hearing the Ld. Counsel for the assessee submitted that all the grounds are covered in favour of the assessee in Assessee's own case for Assessment Year 2012-13 in ITA No. 1380/Del/2017 order dated 07/10/2020 and submitted the chart to that effect.

9. The Ld. Counsel for the assessee has also produced copy of the order of the Co-ordinate Bench in Assessee's own case for Assessment Year 2010-11 and 2011-12 in ITA No. 3738-39/Del/2019 and 3882-83/Del/2016 and for Assessment Year 2012-13 ITA No. 1380/Del/2017 order dated 07/10/2020

and submitted that there is no change of facts of the case, therefore, prayed for dismissal present Appeal of the Revenue in terms of the said orders. On the other hand, the Ld. DR submitted that the issues are covered by the Co-ordinate Bench in Assessee's own case. However, he relied on the order of the Lower Authorities.

10. We have heard the parties, perused the material on record and gave our thoughtful consideration. The Ground No.1 is regarding the disallowance of Rs. 2,20,497/- in respect of Job charges recovered at lesser late from sister concern M/s. Dharampal Premchand Ltd. The identical issue has been considered by the Co-ordinate Bench in Assessee's own case for the earlier years and also in ITA No. 1380/Del/2017 for Assessment Year 2012-13 wherein it is held as under: -

> *"15. Ground number 4 is addition of ₹246,100/– with respect to the job charges recovered at a lesser rate from sister concern M/s Dharampal Premchand Ltd then prevailing market rate. The identical issue has been considered by the coordinate bench in Assessee's own case for earlier year at paragraph number 98 – 99 as Under:-*
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> > *"98. Ground number 12 of appeal is with respect to addition deleted by learned CIT of INR 387876/- made on account of lesser rate of job work charges from sister concern in comparison to other related parties. LD Assessing Officer has considered addition on basis of report of Special auditor wherein it has been observed that Silver foil division of assessee was charging ₹ 3,000/-per Kg from M/s. Dharampal Premchand Ltd. towards job work charges whereas it has charged ₹ 4,100/- per Kg from third parties and as it has*

resulted in understatement of income of assessee and inflation of profits of eligible units of sister concern. Accordingly, addition in respect of difference of rates was made. Ld CIT (A) has deleted addition on ground that impugned addition is purely on notional basis and not sustainable under law.

99. We have heard rival contentions whole addition has been made by learned assessing officer on presumption that Assessee Company has charge of charges at rate of INR 3000 per KG to its group concern for doing job work for them and silver file division as against INR 4100 per KG charged to other parties and other units of company. This was remark of special auditor and it was stated that if it were done for eligible units of group concern then group concerns would be entitled for higher deduction by INR 377876. It is evident that addition of higher rate of job charges is on hypothetical basis and against concept of real income. Further, it is not open to assessing officer to sit in armchair of assessee and to make business decisions on arbitrary basis. Further, there is no provision in Income tax The Act, 1961 that warrants such adjustment and as such, action of assessing officer in increasing rate of job work charged from sister concern M/s. Dharampal Premchand Ltd. is not sustainable under law. Order of CIT (A) is well reasoned and learned departmental representative could not controvert order of learned CIT – A therefore, addition in respect of job work has rightly been deleted by CIT (A).Accordingly, ground number 12 of appeal of learned AO is dismissed."

16. As the facts and circumstances are identical to the facts and circumstances prevailing in the immediate preceding year and the learned departmental representative could not point out any infirmity, therefore respectfully following the decision of the coordinate bench in Assessee's own case, we direct the learned assessing officer to delete the addition/disallowance of ₹246,100/– on account of recovery of

jobcharges at a lesser rate from a sister concern then rates charged to outside party. Accordingly ground number 4 of the appeal is allowed.

By respectfully following the Assessee's own case(supra) we do not find merit in Revenue's grounds of Appeal No. 1. Accordingly, Ground No. 1 of the Revenue is dismissed.

11. Ground No. 2 of the Revenue is regarding the disallowance of deduction Rs. 1,34,04,311/- u/s 80IB/80IC-allocation of interest by head office to eligible units. This issue has been considered in Assessee's own case for Assessment Year 2012-13 wherein it is held as under:-

"31. Ground number 9 of the appeal is against the order of the learned assessing officer wherein he has allocated ₹5,503,526 on account of interest two the eligible unit and thereby reducing the deduction claimed by the assessee by the above sum applying the provisions of39Section 80 IA (8) read with Section 80 IB (13) and 80 IC (7) of the act. The learned AO has noted that assessee company had interest expenditure of ₹521,851,866/–. Assessee has out of that allocated interest expenditure of ₹48,28,98,472 to all the manufacturing units. The assessee has allocated other corporate t expenses to the different units therefore the assessee was asked to submit the basis of allocation of interest expenditure to different manufacturing units. The assessee submitted a details of such expenditure. Assessee also stated that the basis of allocation of the said expenses were made consistently during the earlier years by the assessee company and said allocation was also accepted by the CIT – A and

coordinate bench for assessment year2004 – 05. Therefore the assessee requested that same may not be disturbed.

32. The learned assessing officer rejected the contentions of the assessee and found that assessee should have allocated the full amount of interest expenses to all the units and therefore there is a difference between total interest expenditure of Rs 52.18 and the interest allocated of Rs 482,898,472. Therefore he reduced the total interest expenditure by the interest disallowed u/s 14 A of the act and interest disallowed u/s 36 (1) (iii) of the act. Therefore he found that the net interest expenditure should have been allocated by the assessee to the various units is ₹493,890,004/–. The assessee has only allocated a sum of ₹482,898,472 and therefore there is a short allocation of interest cost to various units of Rs 109,91,532/–. Therefore he allocated the above sum with respect to all the manufacturing units of the assessee and found that a sum of ₹5,503,526 should have been allocated to the eligible units. Therefore he reduced the profit eligible for deduction u/s 80 IB/80 IC by the above sum. The learned dispute resolution panel confirmed the action of the learned assessing officer.

33. The learned authorized representative submitted a detailed chart of interest allocation before us showing the various amount of interest expenditure, to which operation of the business of those relate to, there reason for not pertaining to the eligible units. Therefore it was submitted that this issue is covered in favour of the assessee by theearlier order of the coordinate bench for assessment year 2004 – 05wherein the identical allocation is accepted.

34. The learned departmental representative vehemently supported the order of the lower authorities and submitted that total interest expenditure should have been allocated by the assessee to the various manufacturing units. The learned assessing officer has clear-cut made out a case that assessee has not included the above sum as interest expenditure of the eligible units. Therefore there is no infirmity in the action of the learned assessing officer as well as confirmed by the learned dispute resolution panel.

35. We have carefully considered the rival contention and find that the assessee has incurred the total interest in finance cost of ₹521,851,866/– out of that assessee has already allocated various financial cost to the various eligible units and non eligible units amounting to ₹482,898,472/–. This resulted into unallocated interest cost of ₹38,953,394/–. The assessee has submitted that out of the total cost a sum of ₹23,151,836 relates to the food and beverages divisions and is not at all related to any of the manufacturing units which are eligible for deduction. It is therefore stated that above expenditure does not relate to any of the manufacturing units which eligible for deduction. The view of the assessee is found to be proper that only the interest expenditure which is related to a particular unit should be allocated to that unit and if the balance expenditure is not at all allocated to or specifically related to any other activity, then such expenditure cannot be the reduced from the eligible profit of the industrial undertaking. The object is to derive at the correct profit derived from the industrial undertaking. The object is not to reduce the eligible profit of an industrial undertaking by all the expenditure which are not allocated to eligible unit even if they relate to a certain specific activity of the assessee which is not

eligible for deduction Under those sections. Similarly a sum of ₹6,844,777 was found to be excise duty interest on late payment of tax. On the eligible unit there is no liability of payment of Excise and therefore such interest expenditure cannot be allocated to the eligible units. Further a sum of ₹2,138,478 is related to the mix and drink on account of term loan of Yes bank. It is a specific loan taken by the assessee for a specific project which is not related to an eligible unit, therefore is not required to be reduced from the profits of the eligible unit. The sum of interest cost on bill payable, interest on cash credit interest, on current account interest, on service tax and interest on late payment of tax are not at all related to the eligible unit. Learned departmental representative as well as the learned assessing officer has also not shown that these are the interest expenses which are indirectly connected to the profits of the eligible unit. The learned assessing officer has merely applied mathematical formula without looking at the nature of interest expenditure which have not been allocated to the eligible unit. He has merely stated that total interest expenditure should have been allocated to the various manufacturing units whether they relate to the eligible unit or not. Such is not the mandate of the law to determine the profit eligible which is derived from manufacturing activity for deduction u/s 80 IB/80 IC of the act. The claim of the assessee is that this allocation of interest which assessee is using for last several years which has been accepted by the coordinate bench also in assessment year 2004 – 05.This argument of the assessee has not been controverted by the learned departmental representative. In view of this, we hold that the eligible profit of the industrial undertaking should not have been reduced by the assessing officer by the unallocated interest expenditure which are not at all

related directly or indirectly to the operations of those unit of amounting to ₹5,503,526/- thereby should not result into reduction of the profit eligible for deduction u/s 80 IB/80 IC of the act. Accordingly ground number 9 of the appeal of assessee is allowed."

By respectfully following the Assessee's own case (supra) we do not find any merit in Ground No.2 of the Revenue. Accordingly, Ground No. 2 of the assessee Revenue is dismissed.

12. Ground No. 3 of the Revenue is regarding the disallowance of deduction Rs.2,13,86,623/- u/s 80IC in respect of royalty paid to sister concern M/s Dharampal Premchand Ltd. The similar issue has been considered by the Co-ordinate Bench of this Tribunal in Assessee's own case (supra) wherein it is held as under:-

"40. Ground number 13 of the appeal is also with respect to the disallowance of deduction u/s 80 IB/80 IC in respect of royalty paid to such a concern Dharampal Premchand Ltd on the basis of the provisions of Section 80 IA (10). This issue is identical to the issue decided by the coordinate bench in assessee's own case in earlier year as Under:-

"87. Ground number 5 of appeal of learned AO is against order of learned CIT – A in deleting reduction of claim u/s 80 IB/80 IC of INR 6 9085390/- thus ignoring fact that royalty payment at rate of 3% which was made to sister concern taken by AO was rate approved by regional Dir. Ld Assessing officer has made impugned adjustment of claim of deduction u/s 80IB/IC on ground that royalty @ 1% of net sales paid to M/s.

Dharampal Satyapal & Sons P. Ltd. (Third party) is less than rate approved by Regional Director of Central Government which is 3% and as such profit of eligible units and consequential claim of deduction 80IB/IC is inflated due to less royalty payment. Accordingly, claim of deduction was reduced by increasing royalty payment by eligible units by 2% of net sales in terms of provisions of 80IA(10) r.w.s. 80IB(13) & 80IC(7) of Income Tax The Act, 1961. CIT(A) deleted adjustment on ground that rate fixed by Regional Director was maximum ceiling limit and same cannot be considered as fair value for adjustment in terms of provisions of section 80IA(10) r.w.s. 80IB(13) & 80IC(7) of Income Tax The Act, 1961.

88. We have heard both parties on issue and considered order of learned lower authorities. learned CIT – A has deleted above addition considering that M/s Dharampal Satyapal & Sons Ltd. owns trade mark in field of chewing tobacco such as Tulsi etc. As M/s Dharampal Satyapal& Sons Ltd. is a related party, approval was required for terms and conditions of such royalty payment by Director of Central Govt.of India. As per said agreement, royalty payment cap was fixed at 3% of net sales. However, as mutually agreed, royalty was paid @1% of net sales. Here also Ld AR has argued as in earlier grounds that maximum ceiling of royalty cannot be taken, as market rate as assessing officer has not brought any facts on record stating that under similar circumstances any party has not paid royalty @3%. Maximum ceiling approved by Regional Director is only maximum ceiling cap for payment of royalty as per provision of that Act. Further Ld. AR argued that same rate of royalty is paid to other undertaking of appellant, which are not eligible for deduction u/s 80IB/80IC. Reasons given by ld CIT

(A) for deleting addition are found to be correct. No infirmity was also pointed out by learned departmental representative. It may be appreciated that rate approved by Regional Director is maximum rate and there could we no ground or basis for treating same for any adjustment in terms of provisions of section 80IA(10) r.w.s 80IB(13) and 80IC(7) of the Act. It is relevant to note that same rate of royalty @1% is being paid by both eligible as well as non-eligible units and as such, impugned adjustment is on arbitrary and mechanical basis. In view of this , order of ld CIT(A) deleting adjustment of deduction u/s 80IB/IC on account of notional royalty in respect of "Tulsi" Brand in excess of 1% being payable by eligible units to M/s. Dharampal Satyapal & Sons P. Ltd. Deserves to be upheld as same rate was applied and accepted even by AO in respect of non-eligible units. Accordingly, ground number 5 of appeal of learned assessing officer is dismissed."

41. Therefore respectfully following the decision of the coordinate bench in assessee's own case for earlier year, we direct the learned assessing officer to delete the disallowance of deduction u/s 80 IB/80 IC amounting to ₹ 9,509,442/–. Accordingly ground number 13 of the appeal is allowed.

By respectfully following the above order, we do not find any merit of theGround No. 3 of the Revenue, accordingly Ground No. 3 of the revenue is dismissed.

13. Ground No. 4 of the Revenue is regarding the disallowance of deduction Rs.18,80,67,036/- u/s 80IB/IC on account of upward adjustment in cost of services to allocated to eligible undertakings by head office. The Coordinate

Bench of this Tribunal in ITA No. 1380/del/2017 vide order dated 07/10/2020 in Assessee's own case (supra) has held as under:-

"36. Ground number 10 is with respect to the disallowance of deduction u/s 80 IB/80 IC on account of corporate adjustment in cost of services allocated to the eligible industrial undertaking by head office invoking the provisions of Section 80 IA (8) of the act. On this because the learned assessing officer has made the addition of ₹ 113,491,501/–.

Both the parties confirm that this issue has been considered by the coordinate bench in assessee's own case for earlier year wherein it has been held as under:-

"58. Ground number 11 of appeal of assessee is against order of learned CIT – A with a direction to apply a profit margin of 10% against 26.14% applied by learned assessing officer over and above allocating value of common cost incurred at corporate office, depot, branches et cetera and allocated to such units and an appropriate ratio. Therefore, direction of learned CIT – A is to allocate appropriate cost of corporate office etc. then add that to a profit margin of 10% for purpose of working out deduction of eligible unit u/s 80 IB/IC/IA of The Act. Ld AO has made adjustment on basis of observation of Special Auditor as per which, common cost incurred in respect of eligible units must be allocated after loading mark up @26.14% being rate of operating profit after applying provisions of section 80IA(8) read with sub-section 13 of section 80IB and sub section 7 of section 80IC and making an upward adjustment on account of profit element on these common cost. Ld CIT (A) allowed part relief by reducing mark-up from 26.14% to 10%.

59. Learned authorized representative submitted that it is not case of assessing officer or CIT (A) that Head Office of assessee is providing any services to eligible units. Provisions of section 80IA(8) read with sub-section 13 of section 80IB and sub section 7 of section 80IC will only come into play where services have been provided by HO to eligible unit. However, in present case, services have been rendered by third party at market price and head office is merely allocating proportionate cost to eligible units and as such there is no occasion to compute fair market value of these costs since they are not in nature of goods or services

rendered by Head office. Further, allocation of depreciation as done by Special Auditor has already been deleted by CIT(A) (Page 181) on ground that depreciation is unit and asset specific and same cannot be allocated on arbitrary basis. Since mark-up @10% has also been applied to allocated portion of depreciation, observation of CIT(A) while applying 10% mark-up is irrational and contrary to his own findings. It may be appreciated that it is a case of simple allocation of costs incurred on behalf of units and as such loading of mark-up on such allocation is in total disregard to provisions of section 80IA(8) r.w.s. 80IB(13) & 80IC(7) of Income Tax The Act, 1961. Even otherwise, it may also be appreciated that allocation of common cost is in nature of reimbursement of expenses and as such, there is no valid ground or basis for attributing any profit on such reimbursements.

60. Learned authorized representative further referred to para number 21.3 of decision of learned CIT – A for assessment year 2004 – 05 wherein he has allowed appeal of assessee and deleted above addition. He therefore submitted that it is applicable for this year also.

61. Learned departmental representative vehemently supported order of learned assessing officer and stated that it page number 177 of order of learned CIT(A) appeal wherein he has held that head office, depot and branches being a separate entity has incurred expenditure on behalf of various units including industrial undertaking eligible for deduction is. He rejected argument of learned authorized representative that no services have been provided for services were not acceptable as these expenditure include even advertisement expenses, sales expenses etc. He further held that even if reimbursement of expenses for purchase of raw material and finished goods which goes for eligible undertaking some services have been provided by head office and branch office. He further held that learned CIT A has upheld that any independent persons would have charged trading profit margin on such transfer of goods. Accordingly, he applied estimated profit of 10% of such cost as profit of an office/branches/depot for such services. He therefore submitted that findings given by learned CIT – A are incontrovertible.

62. We have carefully considered rival contentions and perused orders of lower authorities as well as report of special auditor. Fact shows that AO has stated that though assessee has allocated all applicable cost to respective units however AO said that it should further be loaded by markup of 26.14% being

operating profit after applying provisions of section 80 IA (8) read with subsection 13 of section 80 IB and section 7 of section 80 IC for making an upward adjustment on account of profit element on these common cost. Learned CIT – A has reduced markup from 26.14% to 10%. Undisputedly assessee has allocated all cost to respective units for purpose of determining eligible profit for deduction. Only issue is that whether further markup is required to be allocated on these cost or not. Claim of assessee is that various services rendered by 3rd party are at market rate and head office has merely allocated proportionate cost to eligible units and has neither transferred any goods or nor provided any services. It is also claim of assessee that no further services have been rendered by these offices to eligible unit of assessee except allocating cost. Here, undisputedly allocation key has been correctly applied and not questioned by revenue. Therefore, only argument of revenue is that various cost allocated by head office/branches and depot shall also be further increased by a markup of profit of 10% over such cost. Identical issue has been decided by coordinate bench in [68 taxmann.com 322] wherein contention of revenue was that selling and distribution activity is itself a separate profit centre , therefore whatever services have been provided by selling and distribution arm of assessee to eligible undertaking, should have been charged adding profit and reduced from profit of industrial undertaking after valuing services of selling and distribution arm of company by loading profit element. Coordinate bench has decided that no such profit markup is required to be added when only costs have been allocated and no identification of any specific services provided by such units to eligible unit is found. For holding so coordinate bench also relied upon decision of another coordinate bench in Cadila Healthcare Ltd. v. Addl. CIT [2012] 21 taxmann.com 483/67 SOT 110 (URO)(Ahd. - Trib.) and held as under:-

> *"87. It is one of contention of revenue that selling and distribution activity is itself a separate profit center and therefore whatever services have been provided by selling and distribution arm of company to eligible undertaking should have been charged and reduced from profit of industrial undertaking after valuing service of selling and distribution arm of company at market rate. At present assessee has allocated it at cost. Therefore, ld. AO has invoked provisions of section 80 IA (8) of The Act. It is not dispute that that products manufactured by these industrial units are sold by selling and distribution arm of assessee and cost incurred is allocated to these respective units on*

basis of appropriate allocation key of 'sales'. Ld. AR of appellant relying on decision of coordinate bench of Cadila Healthcare Ltd. (supra) has submitted that there cannot be any specific demarcation between manufacturing and selling activities of assessee and profit accrues only at time of sales of goods only. Therefore, contention of revenue that selling and distribution function of assessee is a separate profit center is required to be rejected at threshold. We have carefully considered argument of ld. AR and of revenue on this point as well as ld. AO and Ld. DRP. We are of view that this argument is almost similar to argument raised by revenue in case of Cadila Healthcare Ltd. (supra) Coordinate bench has dealt with these arguments from all angles of controversy and has held as under :-

'9.4 Ld. Counsel has asserted that undisputedly, it was an "inter-division transfer", hence it was expected to record same at arm's length price. He has pleaded that assessee is blowing hot and cold in same breath. When it comes to transfer of services and goods, it opposes arm's length price adjustment and says that expenses which have been incurred in past need not be taken into consideration. As discussed earlier, this logic do not commensurate with provisions of sections. Even then for argument sake if expenses relatable to current year are to be apportioned; it was found that assessee had not apportioned even a penny of expenses in development and research of new products of Baddi Unit.

9.5 Next, Revenue's Counsel has drawn our attention on profit & loss account of eligible Unit, i.e. Baddi Unit, (refer Page No.87 of paper-book). Ld. DR has said that sales to tune of ₹ 1,19,13,22,749/- were recorded for accounting period ended on 31.3.2006. He has pleaded that if said Unit was to sale its products on stand alone basis, then said Unit which was only two years old could not fetch such high sale price. said Unit has shown high profit at ₹ 1,16,82,91,400/-. goods manufactured by said Unit were transferred to marketing division of assessee-company and sale price was noted by Baddi Unit as per final sale price of product. But fact is that marketing divisions and C&F are involved, therefore sales are realized by main marketing division. He has thus pleaded that profit derived from "marketing function" cannot be dragged to manufacturing unit for purpose of claiming deduction u/s.80IC. Special Provision is confined to certain Undertakings, as defined in Statute, and such eligible

undertakings are entitled for deduction of profit of such undertakings only. He has again drawn our attention that only source of income should be eligible source of income and not other sources of income, such as, profits of marketing division or profits on account of established brand. For allocation of profit of manufacturing unit mandate is very clear because Income Tax Rule, 1962 contains Rule 18BBB wherein as per sub-rule(2) a separate report is to be furnished by each undertaking and that report shall be accompanied by a profit & loss account and balance-sheet of that Undertaking as if Undertaking is a distinct entity. He has therefore argued that allocation of profit of a manufacturing unit should be made on stand alone basis. He has questioned that how sale price of products of Baddi Unit were determined and recorded. Because of brand value sale price must have been determined by management as if profit is earned by assessee company on sale of products of Baddi Unit. It was recorded on presumption that sales were executed by Head Office by charging brand value, name of product and goodwill of Company. In any case, according to Ld. DR, a reasonable expenditure should have been provided, so that such an abnormal profit @ 58.66% could be checked.

9.6 In support of above submissions, Mr. Srivastava has placed on strong reliance on decision of Hon'ble Supreme Court in case of CIT v. Ahmedbhai Umarbhai & Co. [1950] 18 ITR 472 for legal proposition that, quote " profits received relate firstly to his business as a manufacturer, secondly to his trading operations, and thirdly to his business of import and export. Profit or loss has to be apportioned between these businesses in a business like manner and according to well established principles or accountancy." Unquote. He has also placed reliance on Liberty India (supra) .

10. We have heard both side at length. controversy as raised by Addl. CIT Mr. Mahesh Kumar, officiating as AO, has serious repercussions on subject of computation of "eligible profit" while claiming a deduction under Statute. adjustments as suggested by AO while working out manufacturing profit of an eligible Unit has a far reaching consequences on all such tax-payers; therefore we have to deal this issue carefully and little elaborately, so that we can reach to a logical conclusion.

10.1 To begin with, it is better to elucidate that I.T. The Act has only defined 'income' (Sec. 2(24)) as well as 'business' (Sec. 2(13)) but not term "profit and gains". However, section we have to deal with i.e. Sec. 80 IC revolves around term 'profits and gains'. As per section 2(13) 'business' includes trade, commerce or manufacture. In auxiliary, as per section 2(24) 'income' includes (i) profits and gains. An 'income' has to have a component of 'profits & gains' but all type of 'profits & gains' may not be an 'income' for tax purpose under The Act. section in controversy i.e. Sec. 80 IC of The Act is embedded with both these terminology, reproduced verbatim :-

"80IC (1) Where gross total income of an assessee includes any profits and gains derived by an undertaking or an enterprise from any business referred to in sub-section (2), there shall, in accordance with and subject to provisions of this section, be allowed, in computing
total income of assessee, a deduction from such profits and gains, as specified in subsection(3)".

10.2 'business' is prescribed in sub-section (2) in following manner :

(2) This section applies to any undertaking or enterprise
(a) which has begun or begins to manufacture or produce any Article or thing ……
Therefore, 'manufacturing' is first criteria for eligibility of 'business' to qualify for deduction.
Hence 'profits' are required to be derived from a manufacturing undertaking which is producing specified article. That 'profit' is inclusive in 'gross total income'. As already noted, terminology "profit" has not been defined in this The Act therefore we have taken help of other resources. basic question is that what is "profit" of a manufacturing unit?

Firstly, term "Profit" implies a comparison between stage of a business at two specific dates separated by an interval of a year. Thus fundamentally meaning is that amount of gain made by business during year. This can be ascertained by a comparison of assets of business at two dates. To determine "profit" of a manufacturing Unit accounting standard has given certain guidelines, enumerated in short. In accounting "profit" is difference between purchase price and cost of bringing product to market. A "gross profit" is equal to sales revenue minus cost of goods sold or expenses that can be traced directly to production of goods. Rather, "operating profit" is also defined as equal to sales revenue minus

cost of goods plus all expenses, except interest and taxes. Most of manufacturing companies have 'Total Cost' based pricing method. Total Cost has, broadly speaking, two components; i.e. raw-material plus value addition (it includes all overheads). Therefore, profit margin is price minus total cost. In manufacturing Unit, thus cost of conversion is production overheads, such as, direct labour cost and inextricably linked expenditure of production. In general, every manufacturing concern has fixed manufacturing capacity. So objective of such concern ought to be to maximize profit. Now problem, as posed, is that let us assume that said manufacturing unit is producing two products; viz. "A" & "B". For production of "A" product, let us say, there is less working hours, but fetching more value for less money. However, in production of product "B" due to complex process of manufacturing it requires more working hours. For pricing product "B" situation is that more money expenditure and may fetch less value. Therefore, in processing department it is not possible to segregate two components to determine segregated margins. Keeping this accounting principle in mind, we revert back to language of section 80IC which says that a deduction is permissible of such profits of a specified Undertaking engaged in manufacturing of certain article or thing. business of said enterprise/concern should be manufacturing of article or thing and profit therefrom is eligible for deduction u/s.80IC if that profit is part and parcel of gross total income. As noted hereinabove, profit is difference between purchase price and cost of production along with cost of bringing product to market. This basic principle of accountancy, as appeared, have been adopted by Baddi Unit because as per Profit & Loss account, cost of material, personal cost and general expenses, corporate expenses were reduced from sale price to arrive at "profit before tax" i.e. ₹ 116,82,91,400/-.

10.3 It is not in dispute that for Baddi Unit assessee has maintained separate books of accounts and therefore drawn a separate profit and loss account. In such a situation, whether AO is empowered to disturb computation of profit, is always a subject matter of controversy. From side of assessee, reliance was placed on Addl. CIT v. Delhi Press Patra Prakashan [2006] 10 SOT 74 (Delhi) (URO). In this case, assessee was claiming deduction u/s.80IA in respect of a Unit No.4. said Unit was showing profit @ 62%. a against that, AO has noticed that a margin of profit shown by assessee as a whole was only to extent of 10%. AO has therefore recomputed profit of said Unit by applying subsection
(10) of section 80IA and restricted profit of said Unit to 10% only. While dealing this issue, Respected Coordinate Bench has concluded that it was not justified to disturb working of profit merely because

profit rate of eligible unit was substantially higher than overall rate of profit of other Units of assessee, more so when separate books were maintained by assessee in respect of said eligible Unit. In present case as well AO has proceeded to disturb profit of Baddi Unit and held that only 6% profit is eligible for deduction u/s.80IC. While doing so, identically, AO has not pinpointed any defect in working of "profit" of Baddi Unit. In such a situation, we can say that legal proposition as laid down by Delhi Bench can also be applied in present appeal as well.

10.4 AO has also concluded that only incremental profit, representing difference between profits earned earlier when products were procured on P2P basis and profits earned by Baddi Unit, should be treated as a manufacturing profit. AO has then said that earlier assessee was procuring products on P2P basis and showing average profit at 80%, however, on basis of average selling rate of produces manufactured by Baddi Unit average profit was gone up to 86%. AO has therefore restricted deduction only at 6%. He has placed reliance on Rolls Royce Plc (supra). In that case, assessee was a UK based company carrying on marketing and sales activities in India through a subsidiary. subsidiary was also rendering support services to assessee, a UK based company. assessee was carrying out manufacturing operations. It was held that 35% of its profits could be attributed to marketing activities carried out in India and, therefore, chargeable to tax in India. Facts of that case were altogether different and there was a finding that undisputedly there was a PE in India and as per Indo-UK DTAA income has to be taxed in India. An another fact was that there was no separate account of assessee's India operation and AO had found that on basis of global accounts profits were determined on sales. In that case, marketing was said to be primary activity for earning profit. profit was directly due to operation in India. In that context word "attributable" was considered and then it was held that such part of income as it was reasonably attributable to operations carried out in India is taxable. expression "business connection" was also considered and then it was found that it will include a person acting on behalf of a non-resident and carried on certain activities is having business connection. A business connection has to be real and intimate and through which income must accrue or arise whether directly or indirectly to non-resident. On those facts, since it was found that R&D activities were carried out by assessee, therefore, 15% of profit was allocated to R&D activities and balance of profit was attributable to marketing activities in India. said decision was entirely based upon

connectivity of marketing operations with profits. CBDT Circular No.23 of 1969 dated 23/07/1969 was also taken into account wherein it was opined that where a non-resident's sales to Indian customers are secured through services of an agent in India then that profit is attributable to agent's services. Meaning thereby because of close connection of agent's marketing activity proportionate profit was attributed to said activity. Contrary to this, there was no finding that upto extent of 80%, profit was attributed to assessee-company. segregation between 80% and 6% was not on account of any evidence through which it could independently be established that major portion of profit could be attributed to assessee-company and rest of profit could only be attributed to Baddi Unit.

10.5 AO has also made out a case that book profit percentage of Baddi Unit was 58.67%, whereas profit of asse sseecompany as a whole was 11.88%. If we further elaborate this aspect, then AO has also given a working through which average selling rate was 86.36% of Baddi Unit. Meaning thereby if we presume for example that assessee has gross profit of 86%, then net profit was disclosed at 58%. A question thus arises that what beneficial purpose could be served for reduction of gross profit to a lower percentage of net profit, specially when allegation of A.O. was that there was an attempt to declare higher profit of Baddi unit to get more advantage of deduction. On perusal of P&L account, it is an admitted factual position that assessee has in fact debited certain expenses which have included head office expenses, such as, marketing expenses and corporate expenses. Meaning thereby net profit of Baddi Unit was not merely production cost minus sale price, but difference of sale price minus all general expenses which were attributable to sales. Therefore, it is not reasonable to say that unreasonably profit was escalated. Difference between two percentages of profit, i.e. about 28% (G.P. - N.P.) thus represented expenditure which could be said to be in respect of marketing network and brand of product related expenses. AO has not complained about allocation of expenditure as made by assessee while computing profit of Baddi Unit. Once assessee has itself taken into account related expenses to arrive at net profit, then it was not reasonable on part of Revenue Department to further reallocate those expenses by curtailing percentage of eligible profit.

10.6 From side of Revenue, ld. Special Counsel has argued that in terms of provisions of section 80IA(5) deduction is to be computed as if such eligible business is only source of income of assessee. According to him, manufacturing profit was only source of income

and that alone should be accounted for in P&L account to claim deduction u/s.80IC of The
Act. Ld. DR has explained that as per view of A.O. up-to 80% of profit was result of efficient marketing net work plus due to brand name of company. Only 6% was manufacturing profit, per A.O. It is true that section 80IC does recognized provisions of section 80IA. Refer, Sub-section (7) of section 80IC which prescribes as follows:-

"Section 80IC(7) : provisions contained in sub-section (5) and sub-sections (7) to (12) of section 80IA shall, so far as may be, apply to eligible undertaking or enterprise under this section." Due to this reason, our attention was drawn on provisions of section 80IA(5) of IT Act; reads as under:-

"Section 80IA(5) : Notwithstanding anything contained in any other provision of this The Act, profits and gains of an eligible business to which provisions of sub-section (1) apply shall, for purposes of determining quantum of deduction under that sub-section for assessment year immediately succeeding initial assessment year or any subsequent assessment year, be computed as if such eligible business were only source of income of assessee during previous year relevant to initial assessment year and to every subsequent assessment year up to and including assessment year for which determination is to be made."

As per this section, profits of an eligible undertaking shall be computed as if such eligible business is only source of income of assessee. In this section again, Statute has used three terms, i.e. "profit", "business" and "income". As narrated hereinabove an 'income' has a wider expression than 'profit'. Likewise, 'business' has also a wider meaning than word 'income'. In present case, manufacturing of pharmaceutical products is declared as "eligible business". Then question is that what is profit of such an eligible business? On careful reading of this sub-section, it transpires that said eligible profit should be only source of income. If we examine separate profit & loss account of Baddi Unit, then it is apparent that only source of income was sales of qualified products. In said P&L A/c there was no component of any other sources of income except sale price and otherwise also assessee has confined claim only in respect of eligible profit which was derived from sales of pharmaceutical products. This section do not suggest that eligible profit should be computed first by transferring product at an imaginary sale price to head office and then head office should sale product in open market. There is no such concept of segregation of profit. Rather, we have seen that profit of an undertaking is always

computed as a whole by taking into account sale price of product in market.

10.7 Ld. AO has suggested that assessee should have passed entries in its books of account by recording internal transfer of product from Baddhi Unit to head office marketing unit and that too at arm's length price. From side of appellant an argument was raised that what should be arm's length price in a situation when a product is ultimately to be sold in open market. Whether AO is suggesting that an imaginary line be drawn to determine profit of Baddi Unit at a particular stage of transfer of products. Definitely a difficulty will arise to arrive at sale price as suggested by AO on transfer of product from Baddi to head office. What could be reasonable profit which is to be charged by Baddi Unit will then be a subject of dispute and shall be an issue of controversy. On contrary, if sale price is recorded at market price, which is easily ascertainable, that was recorded in Baddi Unit account, scope of controversy gets minimal. Rather, intense contention of Ld.AR is that facts of case have explicitly demonstrated that goods manufactured at Baddi Unit were transported to various C&F agents across country for sale purpose. Therefore, eligible business is manufacturing of pharmaceutical products and only source of income was profit earned on sale of products.

10.08 An interesting argument was raised by Id. Special Counsel that provisions of section 80IA(8) prescribes segregation of profit in case of transfer of goods from one Unit to another Unit. But section 80IA(8) reads as follows:-

> *'Section 80IA(8) : Where any goods or services held for purposes of eligible business are transferred to any other business carried on by assessee, or where any goods [or services] held for purposes of any other business carried on by assessee are transferred to eligible business and, in either case, consideration, if any, for such transfer as recorded in accounts of eligible business does not correspond to market value of such goods [or services] as on date of transfer, then, for purposes of deduction under this section, profits and gains of such eligible business shall be computed as if transfer, in either case, had been made at market value of such goods or services as on that date:*

Provided that where, in opinion of Assessing Officer, computation of profits and gains of eligible business in manner hereinbefore specified presents exceptional difficulties, Assessing Officer may compute such profits and gains on such reasonable basis as he may deem fit.

Explanation : For purposes of this sub-section, "market value", in relation to any goods or services, means price that such goods or services would ordinarily fetch in open market. Where any goods held for purpose of eligible business are transferred to any other business carried on by assessee, then if consideration for such transfer as recorded in accounts of eligible business do not correspond to market value of such goods, then for purposes of deduction profits and gains of such eligible business shall be computed as if transferhas been made at market value of such goods as on that date.

Though section has its own importance but area under which this section operates is that where one eligible business is transferred to any other business. We again want to emphasis that word used in this section is "business" and not word "profit". We can hence draw an inference by describing these two words and thus have precisely noted that 'eligible business' has a different connotation which is not at par or identical with "eligible profit", matter we are dealing is not case where business as a whole is transferred. This is a case where manufacturing products were sold through C&F in market. Even this is not case that first sales were made by Baddi Unit in favour of head office or marketing unit and thereupon sales were executed by head office to open market. Once it was not so, then fixation of market value of such good is out of ambits of this section. If there is no inter corporate transfer, then AO has no right to determine fair market value of such goods or to compute arm's length price of such goods. AO has suggested two things; first that there must be interoperate transfer, and second that transfer should be as per market price determined by AO. Both these suggestions are not practicable. If these two suggestions are to be implemented, then a Pandora box shall be opened in respect of determination of arm's length price vis a vis a fair market and then to arrive at reasonable profit. Rather a very complex situation shall emerge. Specially when Statute do not subscribe such deemed intercorporate transfer but subscribe actual earning of profit, then impugned suggestion of AO do not have legal sanctity in eyes of law.

10.09 A very pertinent question has been raised by Id.AR Mr. Patel that what should be line of demarcation to determine sale price of a product if not market price. As far as present system of fixation of sale price of product is concerned,

a consistent method was adopted keeping in mind several factors, depending upon market situation, we have been informed. But if assessee is compelled to deviate from consistent method of pricing, then any other suggestion shall not be workable because no imaginary line of profit can be drawn, precisely pleaded before us. So uncertainty is that on production cost what should be reasonable mark-up which shall cover up margin of profit of a manufacturing unit. And why at all this complex working of computation be adopted by this assessee when a very simple method is adopted that on one side of P&L A/c production cost plus overheads were debited and on other side of P&L A/c sale price was *credited to computed profit. There are certain expenditure which are notional expenditure and there are certain expenditure which are self-generated to create brand value of a product. Naturally, allocation of notional expenditure particularly in respect of self- generated brand is a matter of hypothesis and not a matter of realty. Logically it is not realistic to set apart a value of a self generated brand which had grown in number of years.*

10.101 segment reporting of profit is although in practice but purpose of such reporting is altogether different. Such segment information is particularly useful for financial analysis, so that management may keep a close watch on performance of diversified business lines, areas of demarcation are business segment, geographical segment, etc. But as far as Revenue of an enterprise is concerned while segmentation is required, then Revenue from sales to external customers are reported in segmented statement of profit and loss. In an accounting system, an intra-company sale between divisions or units is not regarded as Revenue for purpose of such financial reporting. As per Accounting Standards an Enterprise Revenue ignores in house-sales that represent Revenue to one segment and Expense to another. In this connection, AO has discussed Hon'ble Supreme Court decision pronounced in case of Liberty India (supra). AO wanted to justify his attempt of segmentation on basis of theory that only profits derived due to manufacturing activity can be said to be derived from eligible undertaking. It was contested by AR before us that "segment reporting is about segregation of business and not about segregation of any specific activity. In case of Liberty India (supra) it was observed that IT The Act broadly provides two types of tax incentives, namely, investment linked incentives and profit linked incentives. Court was

discussing Chapter VIA which provides incentive in form of tax deductions to category of "profit linked incentives", incentive is linked with generation of 'operational profit'. Therefore, respected Parliament has confined grant of deductions only derived from eligible business. Each eligible business constitutes a stand alone item in matter of computation of profit. Court has said that because of this reason concept of "segment reporting" was introduced in Indian Accounting Standards. Ld. Counsel Mr. Srivastava has argued that deduction u/s.80IC is a profit linked incentive. Only Operational Profit has to be claimed for 80IC deduction. According to him, each of eligible business constitutes a stand alone item in matter of computation of profit. For computation of profit of an eligible business word used is "derived'[1] in section 80IC which is a narrower connotation, as compared to word "attributable". In other words, by using expression "profits derived by an undertaking", Parliament intended to cover such sources not beyond first degree, i.e. first degree of manufacturing activity, law pronounced by Hon'ble Supreme Court is final and should not be disputed. However, a judgement is to be correctly interpreted.

10.11. Finally, on question of segmentation of profit a vehement reliance was placed on an old precedent namely Ahmedbhai Umarbhai & Co. (supra). Facts of that case was that assessee had owned three Mills at Bombay and one at Raichur (Hyderabad), assessee was manufacturing oil from groundnuts, produced at Raichur, Hyderabad is partly sold at Raichur and partly in Bombay, question was in respect of liability under Excess Profit Tax The Act (EPT The Act) for oil manufactured at Raichur but sold in Bombay, controversy was that assessee had contended that a part of profits derived from sales in British India of oil manufactured at Raichur was attributable to manufacturing operations at Raichur which are an essential part of their business and that such profit must be excluded from assessment under EPT The Act. It was narrated that in other words, The Act brings within its ambit all income in case of a person resident in British India which accrues or

arises or which is deemed to accrue or arise to him in British India during accounting year. If Sec. 5 of The Act stopped short at that stage, it was undoubted that in case of respondent who is a resident in British India all his income, no matter where it arose, within British India or without British India, would be chargeable to excess profits tax just in same way as it chargeable to income-tax under Indian IT The Act. whole of his income arising in Raichur has legitimately been taxed under that The Act. In that decision also, word "business" was defined, i.e. business includes any trade, commerce or manufacture. It has also been said that all businesses, to which said law applied, carried on by same person shall be treated as one business for purpose of said The Act. question was about manufacturing activity and it was contended that if a man is a manufacturer as well as a seller of goods, then in his case term "part of a business" means carrying on all two activities together and therefore constitute part of business. One of Hon'ble Judges has said that activities which assessee carried on at Raichur was certainly a business of assessee. On one hand, it was argued that accrual of profit must necessarily be at place where sale proceeds are received or realized. But on other hand, it was argued that profits received relate (i) firstly to his business as a manufacture, (ii) secondly to his trading operations and (iii) thirdly to his business of export. On that basis, it was opined that profit or loss has to be apportioned between these businesses in a business like manner and also according to well established principle of accountancy. This apportionment of profits between a number of businesses which are carried on by same person at different places determines also place of accrual of profit. The Act of sale is mode of realizing profits. If goods are sold to a third person at Mill premises, one could have said that profits arose by reason of sale. Profit would only be

ascribed to business of manufacture and would arise at Mill Premises. Merely because a Mill owner has started another business organization in nature of sale depot, that cannot wholly deprive business of manufacture of its profits, though there may have to be apportionment in such a case between business of manufacture and business of shop keeping, question which was answered was that whether in respect of manufacturing business of assessee in Raichur, profits accrue or arise and if so, at what place. One of Hon'ble Judges has opined that manufacturing profit arise at place of manufacture and that sale profits arise at place of sale and that apportionment has to be made between two, though place of receipts and realization of profits is place where sales are made. Simultaneously it was also opined that manufacturing profit could not be said to have accrued at that place because there was nothing done from which profits could accrue. There was an interesting contradiction because of divergent views and it was *also expressed that it was a fallacy to regard profits as arising solely at place of sale. It was said that revenue of company are derived from a series of operation, including purchase of raw-materials or partly manufactured articles, completely manufacturing its products and transporting and selling them, and receiving proceeds of such sales, essence of its profit- making business is a series of operations as a whole.*

10.12 We have carefully perused this decision of Hon'ble Supreme Court as cited by Special Counsel Mr. Srivastava. At outset, we want to place on record that entire issue before Hon'ble Supreme Court was in respect of third proviso to section 5 of EPT The Act. said proviso was duly a reproduced in para-40 of order and for ready reference typed below:- "Provided further that this The Act shall not apply to any business whole of profits of which accrue or arise in an

Indian State, and where profits of a part of a business accrue or arise in an Indian State, such part shall, for purposes of this provision, be deemed to be a separate business whole of profits of which accrue or arise in an Indian State, and other part of business shall, for all purposes of this The Act, be deemed to be a separate business." point for consideration was that whether on those facts third proviso to section 5 could be invoked, manufacturing activity of making ground-nut oil was carried out at Raichur (Hyderabad) which was treated as a separate business within meaning of said proviso and thereupon it was claimed as exempt being carried out within territorial jurisdiction of Indian State. So Court has observed that to succeed in their claim, it is incumbent upon assessee to show that there was in fact a part of a business and that profit had actually accrued or arose in that part of an Indian State. Court has clearly stated in para-41 that both elements should found exist and then only business could be treated as a separate business. However, said proviso has propounded only deeming provisions, as is apparent from language of section itself. For purpose of said section, it was deemed to be a separate business, whole of profits of which accrue in an Indian State and other part of business be deemed to be a separate business.

In para-44, Hon'ble Court has discussed problem with reference to certain decisions of English Courts and then made an observation that it had been held that if separation is possible in such cases, proper course is to follow that sever profits of two businesses and assess accordingly, result of discussion was that profits of two businesses were directed to be apportioned. Simultaneously, Hon'ble Court has also made an observation, quote "It is true that these are cases where several businesses were amalgamated and carried on together, or more of which were not liable to tax or excess profits

duty; but principle of apportionment upon which these cases were decided could, in my opinion, be applied with equal propriety to cases where one part of business is distinct and separate from other parts and is capable of earning profits separately." unquote.

Hon'ble Judge was therefore very much concern about fact that business should be capable of earning profits separately. Rather, in subsequent paras it was further made clear that manufacturing profit could be sub-divided only if there was no insuperable/challenging difficulty in making such apportionment. A possibility was therefore discussed that there could be apportionment of net profit that accrue to business of assessee and one portion of it could be allotted to that part of business which relates to manufacture of said commodity which was ultimately sold in market.

Raichur factory certainly has business connection in British India for a part of oil manufactured by it is sold through Bombay establishment of assessee. That all operations of Raichur business are not carried on in Bombay. Therefore, profits that would be deemed under this section to accrue or arise in Bombay will only be profits which may reasonably be attributed to that part of operations carried on in Bombay, that is to say, to sale of part of its oil in Bombay. In this context, an observation was made that a trade is completed at a place where a business transaction is closed. Profits of a business are undoubtedly not "received" till commodity are sold and they are ascertained only when sale take place. This aspect has not been doubted or challenged even in said order. But in said order question was that if a part of a business consisted of manufacturing activity and that activity can be segregated so as to compute yield profit, then whether such profit accrue only at place where

manufacture are sold. To answer this question, Hon'ble Court has commented in para- 49 that there was no express direction as to apportionment in third proviso to section-5 of EPT The Act. opinion expressed was very specific that a profit can accrue in respect to that part of a business only when apportionment is possible. Hon'ble Court has said that only on said assumption that apportionment was possible said proviso was based upon that presumption only. If no apportionment can be made in respect of process of a particular business, then that will not be considered to be a part of business at all and held that proviso will not apply. It was concluded that principle of apportionment was implied therein. After this detailed discussion, we thus arrive at conclusion that principle of apportionment was criteria for segregating manufacturing profit if it was feasible to do so. As against that in present case assessee has computed profit of Baddi Unit on basis of well accepted principle of accountancy that a profit is accrued where a transaction is closed, meaning thereby profit arises solely at time of sale.

10.13 After detailed discussion, before we close controversy we would like to express that AO's proposition of segmentation of eligible profit of manufacturing unit was not altogether meaningless. This approach of AO cannot be brushed aside on fact of it. But at present, when method of accounting as applicable under Statute, do not suggest such segregation or bifurcation, then it is not fair to draw an imaginary line to compute a separate profit of Baddi Unit. Baddi Unit has in fact computed its profit as per a separately maintained books of account of eligible manufacturing activity. To implement method of computation at stand alone basis, as conveyed by AO, manufacturing unit has prepared a profit & loss account of its manufacturing-cum-sale business activity. If Statute wanted to draw such line of segregation between manufacturing activity and

sale activity, then Statute should have made a specific provision of such demarcation. But at present legal status is that Statute has only chosen to give benefit to "any business of drug manufacturing activity" which is incurring expenditure on research activity is eligible for this prescribed weighted deduction, segregation as suggested by AO has first to be brought into Statute and then to be implemented. Without such law, in our considered opinion, it was not fair as also not justifiable on part of AO to disturb method of accounting of assessee regularly followed in normal course of business. It is true that otherwise no fallacy or mistake was detected in books of accounts of Baddi Unit prepared on stand alone basis through which only source of income/profit was manufacturing of specified products. We therefore hold that AO's action of segregation was merely based upon a hypothesis, hence hereby rejected. These two grounds Nos. 6 & 7 are allowed."

88. We have carefully perused this decision and note that controversy in this ground of appeal with respect to applicability of section 80 IA (8) of The Act, on marketing and other selling distribution as well as research and development services provided by undertaking as a whole to eligible industrial undertaking at cost or market rate for working out eligible profit for deduction, has been decided. Ld. DR could not point out any other contrary judgment to decision cited by Ld. AR. Therefore, we respectfully following above decision of coordinate bench hold that provisions of section 80IA(8) of The Act does not apply to assessee on transfer of services of marketing division of company to eligible industrial undertaking whose profits are claimed as deductible."

63. Therefore in absence of any finding that head office, branches or depot are providing any services and are considered as a profit

centre by assessee or any finding by learned assessing officer, no further profit can be attributed on actual cost allocated by these units to eligible units. Further actual cost charged by 3rd parties are merely allocated to eligible and non eligible units of assessee without making any further noticeable addition to such costs, profit ratio of 10% over and above cost cannot be imputed for working out eligible profit of unit. Further learned CIT - A in assessee's own case for assessment year 2004 - 05 has himself held that without any provision of services to assessee, he himself did not agree with finding of learned assessing officer about these facts for assessment year 2004 - 05. Learned CIT DR also did not point out before us that was there any value addition made by these head office or branches to various cost allocated by assessee. In view of this ground, number 11 of appeal of assessee is allowed and AO is directed to not to markup any profit element on allocation of common cost to eligible undertaking."

The learned departmental representative could not point out any reason to deviate from the decision of the coordinate bench in assessee's own case for earlier years. He also could not point out any change in the facts and circumstances of the case of that the loading of the mark up on allocated cost of the goods or services is justified or any other reasons. He could not also show that this is not a mere allocation of the third-party cost to the eligible and non-eligible units and there is no value addition is involved therein. Therefore respectfully following the decision of the coordinate bench, the ground number 10 of the appeal of the assessee is allowed and the learned assessing officer is directed to delete the disallowance of deduction u/s 80 IB/80 IC on account of purported adjustment in cost of services allocated to eligible industrial undertaking."

The learned departmental representative could not point out any reason to deviate from the decision of the coordinate bench in assessee's own case for earlier years. He also could not point out any change in the facts and circumstances of the case of that the loading of the mark up on allocated cost of the goods or services is justified or any other reasons. He could not also show that this is not a mere allocation of the third-party cost to the eligible and non-eligible units and there is no value addition is involved therein. Therefore respectfully following the decision of the coordinate bench, the ground number 10 of the appeal of the assessee is allowed and the learned assessing officer is directed to delete the disallowance of deduction u/s 80 IB/80 IC on account of purported adjustment in cost of services allocated to eligible industrial undertaking

By respectfully following the same, we do not find merit in the Ground No. 4 of the Revenue. Accordingly, the revenue's Ground No.4 is dismissed.

14. Ground No. 5 of the Revenue is regarding the disallowance of deduction Rs. 32,50,77,441/- u/s 80IB/IC by applying provisions of Section 80IA (8) in respect of transfer of goods (Katha & Suprari) from Noida division to eligible undertaking. The said issue has also been considered in Assessment Year 2012-13 in Assessee's own case (supra) wherein it is held as under:-

" 27. Ground number 7 of the appeal is with respect to the disallowance of deduction u/s 80 IB/IC by applying the provisions of Section 80 IA (8) in respect of the transfer of Kathha and Supari from Noida Division II the eligible industrial undertaking on which deduction is allowable. The

learned assessing officer noted that during the year, units located at Noida processing Kathha and another unit at Noida processing supari has transferred processed raw material/semi finished goods to the undertaking which is eligible for deduction amounting to ? 658,619,082/- and **t** *792,144,556/- respectively. The learned assessing officer, as per last year, adopted the manufacturing cost of 11.27% and further profit margin of ? 10 percent on the goods so transferred, held that the transfer value of the goods worth* **f** *1,450,763,638/- comes to ? 1,775,691,170, therefore he reduced the profit of eligible unit by 32,49,27,532/-. The learned assessing officer categorically noted that this addition is made on the basis of the report of the special auditor in previous year and further the fact of the present assessment year are also same as the fact of the earlier year in which special audit was conducted. This issue has been considered by the coordinate bench in the immediately preceding year in which this addition/ disallowance was first made as Under:-*

"40. Ground number 8 of appeal is with respect to finding of learned CIT - A in upholding disallowance of deduction u/s 80 IB/IC on ground that fair market value of goods transferred from Noida Division to eligible unit is higher in terms of provisions of section 80 IA (8) read with 80 IB (13) and 80 IC (7) of The Act for reason that in respect of unprocessed goods profit Mark up to extent of 2% instead of 10% as computed by assessing officer was restricted. With respect to processed catechu, he confirmed valuation by assessing officer and uphold markup of manufacturing expenses and profit rate at rate of 37.85% and 10% respectively. Assessee is further aggrieved in respect of processed cardamom where learned CIT - A confirmed valuation done by assessing officer and uphold markup of manufacturing expenses and profit rate @ of 37.85% and 10% respectively.

41. *Learned assessing officer-examined fact, that assessee has transferred goods from units located at Noida to eligible undertaking at below fair market price. Special auditor reported that from units located at Noida assessee has transferred work in progress in form of processed raw material/semi finished goods worth INR 394051682/- to undertaking eligible for deduction u/s 80 IC below its cost, though assessee company ought to*

have transferred same at fair market price on date of transfer. Special auditor reported that during year under consideration unit has transferred work in progress and for working out value of such transfer, unit has followed same methodology as followed for valuation of its closing work in progress. Therefore, he held that unit has transferred goods in form of work in progress to eligible unit below its cost insofar as value does not include direct cost like manufacturing expenses, power and fuel, direct labour and other fixed and variable overheads like depreciation on plant and machinery factory building etc. .Therefore auditor stated that in absence of any comparable market quotation profit margin of 10% on cost provided for transfer- of excise able goods for captive consumption and followed by assessee company for transfer of excisable goods to these eligible units was considered to workout fair market value of this transfer. Therefore auditors suggested that profit margin of 10% on of cost and therefore there is an understatement of taxable profit of unit by INR 1 01734012/- learned assessing officer questioned assessee on this aspect. Assessee submitted that most of goods are transferred as it is after buying from market without any value addition and even otherwise value addition is negligible, however, it was contested that there is no basis for any margin, much less margin of 10%. It was further contested by assessee that identical issue has been decided by The Commissioner of Income Tax Appeals in Assessee's own case for assessment year 2004 - 05 partly deleting addition. Learned assessing officer rejected explanation of assessee. He held that 10% profit margin is normal profit margin also prescribed under Central Excise rules for valuation of goods of captive consumption. He further stated that special auditor has given detailed working of fair market value of transfer of goods from non-eligible unit to eligible undertaking. Thereafter learned assessing officer held that fair market value of said goods exceeds transfer value by a sum of INR 1 01734012/-. Above issue was contested by assessee before learned CIT - A. Learned CIT - A followed his own order for assessment year 2004 - 05 wherein

i. *in case of goods, which are not processed and sent to eligible units as such, he directed learned assessing officer to load profit margin of service charges rate of 2% on value of goods transferred which is directly sent without processing.*

ii. *With respect to goods those are processed, he confirmed loading of average manufacturing expenses of 37.85% as processing value addition has taken place and further confirmed charging of profit at rate of 10%.*

iii. *With respect to cardamom, he confirmed action of assessing officer of loading of manufacturing expenses at rate of 37.58 percent and profit at rate of 10% as per Excise rules subject to deduction of cost of Chilka transferred to other units from addition.*

42. *Therefore, assessee is aggrieved with order of learned CIT - A has preferred this appeal.*

43. *Ld Authorised representative submitted as under >*

i. *That issue relates to transfer of following three products from Noida division to eligible unit in Guwahati:*

a. Supari

b.Katha

c Elaichi

ii. *Assessing officer has recomputed value of goods transferred on basis of observation of Special Auditor after loading 14.73% mark up on account of manufacturing cost and further 10% mark up on account of profit to value of goods so transferred by applying provisions of section 80IA(8) read with section 80IB(13)/80IC(7) of The Act.*

iii. *Ld CIT (A) has allowed part relief in respect of goods transferred without processing by reducing mark up to 2% and upheld valuation done by AO in respect of semi-processed goods.*

iv. *In this connection, we may submit that assessing officer has failed to appreciate facts of case and adjustment in value of goods is misconceived and on arbitrary basis, goods namely Supari, Katha, and Elaichi are transferred from Noida to eligible unit in Guwahati after negligible amount of processing and as such mark up of 14.73% on account of manufacturing cost is highly arbitrary and without any basis. Further, it may be appreciated that value of goods transferred already includes cost of processing and freight charges and as such there is no ground or basis for any notional mark up of 14.73%.*

v. *Further, assessing officer has loaded mark up of 14.73% on basis of observation of special auditor and has failed to carry out any independent investigation to justify relevance and applicability of same, it may be appreciated that assessing officer has not given any basis for estimating manufacturing and processing charges to extent of 14.73% and as such adjustment is highly arbitrary and without any basis.*

vi. *In addition, there is absolutely no justification for loading additional 10% mark up because of profit as goods are transferred without any substantial value addition. Further, assessing officer has not brought on record any comparable case to justify such huge profit as present case involves simple transfer of goods wherein non-eligible unit is merely acting as a procurement agent on behalf of eligible units in order to ensure economy of cost and regular supply to eligible units.*

vii. *It may be clarified that these products have been purchased for captive consumption and same is not tradable commodity. There has been no sale to any outside party and as such presumption about any profit or market value is irrelevant and misconceived. Further, special auditor has referred central excise rules for purpose of estimation of profit @ 10%. In this regard we may submit that reference to excise rules is wholly irrelevant and out of context as same have no relevance or bearing under Income Tax The Act. rate of 10% profit as per Rule 8 of Central Excise Valuation Rules is specifically for purpose of calculating excisable value of marketable goods and as such same cannot be made basis for estimating fair market value of consumable items in terms of section 80IA(8) read with section 80IB(13)/80!C(7) of The Act.*

VIII. *It is pertinent to note that provisions of section 80IA(8) read with section 80IB(13)/80IC(7) of The Act authorizes an assessing officer to make adjustments in claim of deduction by substituting fair market value of goods transferred from non-eligible unit to eligible unit, section specifically talks about market value that in itself means that product must be marketable having distinct identity. However, goods in present case are raw material being part of production process having no separate identity, product purchased from third parties is transferred after minimal processing and as such, there is not much difference between purchaseprice and transfer price of goods and as such assessing officer is not justified in enhancing value without making reference to any comparable cases.*

IX. *Further, assessing officer has not brought anything on record to establish market value of goods for purpose of provision of section 80IA(8) and as such adjustment made to value of goods transferred from non-eligible unit to eligible unit is arbitrary and not supported by any*

cogent reasoning.

x. *There is thus no basis for addition because of 10% mark up even on cost of goods.*

xi. *In any case, goods have been purchased on behalf of eligible units and at best, any mark up on account of profit should be on processing charges only which could only be to extent of 1-2% of actual cost or value of goods transferred.*

44. *Learned CIT DR vehemently supported order of learned CIT-A appeal and stated that he hasfollowed order of assessee for assessment year 2004 - 05. Even otherwise, hesitated that there is no infirmity in order of learned assessing officer and CIT - A has reduced margin with respect to goods transferred without any processing.*

45. *Learned authorized representative vehemently stated that finding of learned CIT - A for assessment year 2004 - 05 was not at all relevant now as same A.Y. assessment was passed u/s 147/153A of The Act and same has been quashed which has been upheld by honourable High Court and therefore such findings now no more exist.*

46. *We have carefully considered rival contention and perused orders of lower authorities as well as audit report u/s 142 (2A) of income tax The Act of special auditor. Allegation on assessee is that it has made Inter transfer of goods however same has not been taken at market rate and therefore auditor has suggested applicability of rule 8 of Central Excise Valuation (Determination of Price of Excisable goods) Rules, 2000 which provides as under:-*

[8. Where whole or part of excisable goods are not sold by assessee but are used for consumption by him or on his behalf in production or manufacture of other articles, value of such goods that are consumed shall be one hundred and ten per cent of cost of production or manufacture of such goods.]

47. *Provisions of section 80 IA (8) provides that (8) Where any goods 39[or services] held for purposes of eligible business are transferred to any other business carried on by assessee, or where any goods 40[or services] held*

for purposes of any other business carried on by assessee are transferred to eligible business and, in either case, consideration, if any, for such transfer as recorded in accounts of eligible business does not correspond to market value of such goods 41 [or services] as on date of transfer, then, for purposes of deduction under this section, profits and gains of such eligible business shall be computed as if transfer, in either case, had been made at market value of such goods 42[or services] as on that date :

Provided that where, in opinion of Assessing Officer, computation of profits and gains of eligible business in manner hereinbefore specified presents exceptional difficulties, Assessing Officer may compute such profits and gains on such reasonable basis as he may deem fit.

Explanation - 43[For purposes of this sub-section, "market value", in relation to any goods or services, means-

(i) price that such goods or services would ordinarily fetch in open market; or

(ii) arm's length price as defined in clause (ii) of section 92F, where transfer of such goods or services is a specified domestic transaction referred to in section 92 BA.

48. Above section provides that if eligible business receives any services/ goods from other units or business of assessee then if transaction value as recorded in books of account is not corresponding to market value of such goods or services on date of transfer then deduction u/s 80 IA shall be adjusted as a such transfer has been made at market value of such goods as on that date. Market value has further been defined to show that it is price such goods would ordinarily fetch in open market. For this year provisions of domestic transfer pricing does not apply and therefore clause number (ii) do not apply. Further, if assessing officer finds it exceptionally difficult AO may compute income/deduction, as he

may deem fit. Admittedly, in this case learned AO has held that market price of such goods are to be determined as per rule 8 of Central Excise valuation rules 2000. There is no finding by assessing officer about exceptional difficulty being faced in computing such market rate. Even otherwise, assessing officer is guided by auditor has adopted 10% profit over actual cost incurred by assessee of goods transferred as market rate. Learned CIT - A has held that on goods, which are not processed at all and sent to eligible unit directly, then he has imputed profit margin at rate of 2% on value of goods transferred instead of 10%. With respect to goods, which are processed through job work, learned CIT - A has upheld loading of average manufacturing expenses of 37.85% and further, charging of profit at rate of 10% as per rule 8 of Central Excise rules. With respect to goods such as cardamom, which is purchased, processed, and then transferred to eligible units, he has further upheld cost loading of 37.58% and further profit at rate of 10% as a market price of goods. However in above prices there is no finding that in open market such semi finished goods are sellable or not. Explanation which defines market price provides that market price means price such goods would fetch ordinarily in open market. Therefore, there has to be a clear-cut finding that such goods are marketable, they have a sale price, and such sale prices determination is in open market. Therefore, it is apparent that market price can be more than cost and less than cost of goods. Therefore, any approach of loading of cost on goods, which are transferred from one undertaking to another undertaking without determination of market price of such goods, is not the mandate of provisions of section 80 IA (8) of The Act. Therefore any such attempt to substitute 'cost plus profit" as market value of goods without finding out what could be 'market value' of goods is not acceptable as it is not requirement of law. If views of lower authorities is subscribed to, then it will amount that market price can never be less than cost of goods sold and therefore it presumes a market where only profit exists. Such can never be situation. In view of this, we reject finding of lower authorities and learned assessing officer that value that has been recorded in transfer of goods from one unit to another should further be

loaded by cost of 37.58%. Further 10% profit has been presumed under Central Excise provision for purpose of transfer of goods as captive consumption for another unit. Therefore if goods having a cost of o 100/- is transferred to another unit, then transaction value of such goods shall be considered at INR 110/-. Therefore transferring unit will pay excise duty on INR 1 10 and unit to which such goods have been transferred will claim duty credit paid on transfer value of INR 110. Therefore, above rule can only be applied with respect to duty set off of excisable units. Central Excise rules has stated that INR 110/-would be deemed transaction value of such goods. Rule 8 of Central Excise valuation rule is a deeming provision. It does not say what could be market price of such goods but for purpose of levy of Central Excise it deems that INR 110/- shall be transaction value. Therefore, in absence of any mandate available that Central Excise valuation rule 8 provides for market price of such goods, same cannot be imported into provisions of section 80 IA (8) of The Act. However, as assessee himself has stated that profit can be imputed at rate of 1 or 2% of value of transaction price recorded in books of accounts, we direct learned assessing officer in case of processed goods such as Kattha and cardamom to compute 2% on process charges as profit for computation of market price of goods transferred inter-unit. Accordingly, learned assessing officer is directed to consider transaction value of goods, which are not processed and sent to eligible unit, is recorded in books of accounts. With respect to goods, which are processed through job work and transferred to eligible unit, learned AO is directed to impute 2% profit over job work charges i.e. cost incurred by assessee for determination of profit u/s 80 IA of income tax The Act. Accordingly, ground number 8 of appeal of assessee is allowed with above direction."

28. In that particular year the addition was partly upheld by the coordinate bench based on the order of the learned CIT – A with respect to the profit margin of the goods which are not processed and sent to eligible unit directly. The learned departmental representative could not show us any reason to either increase the

above rate neither the learned authorised representative demonstrated that the addition confirmed by coordinate bench in this year is unjustified, therefore, respectfully following the order of the coordinate bench in Assessee's own case for that year, we also direct the learned assessing officer to recompute the deduction following the order of the coordinate bench for that year. Accordingly ground number 7 of the appeal is partly allowed.

By respectfully following the order of Assessee's own case and following the principles of consistency we do not find merit in Ground No. 5 of the Revenue. Accordingly, Ground No. 5 of the Revenue is dismissed.

15. Ground No. 6 of the Revenue is regarding the disallowance of deduction Rs. 13,18,350/- u/s 80IB/IC by applying provisions of Section 80IA (8) in respect of transferred from Silverfoil Division. The Co-ordinate Bench of the Tribunal in Assessee's own case for Assessment Year 2012-13 while dealing with the very same issue has held as under:--

"29. The ground number 8 of the appeal is with respect to the disallowance of deduction u/s 80 IB/80 IC by applying the provisions of Section 80 IA (8) in respect of transfer from silver foil division amounting to ? 2,653,575. Both the parties confirm that this issue is identical to the issue decided by the coordinate bench in Assessee's own case for immediately preceding year. The coordinate bench has decided this issue as Under:-

"114. Ground number 7 of appeal of assessee is with respect to disallowance confirmed by learned CIT - A of eligible income u/s 80 IB/80 IC to extent of INR 13634222/- by applying provisions of section 80 IA (8) on ground that fair market value of goods transferred from silver foil division to eligible undertaking was held than that declared by appellant. Brief facts of issue are that special auditor is reported that during year under consideration silver for unit has transferred goods of INR 9 7796985 to various units including INR 4 5266554/- to manufacturing units eligible for deduction u/s 80 IB/80 IC of income tax Act. Learned auditor has considered for arriving at transfer value of silver foil is on FIFO method considering value of raw silver. He compared market value of silver on date of order booking by customer. Therefore, he found that there is a difference in outside customer's sale rate and inter-unit transfer rates because of frequent variation in price of raw silver during year. Therefore, auditor stated that silver for unit has transferred products to eligible units below fair market value. Based on this , he worked out fair market value of products transferred to eligible units taking average market price and stated that there is an understatement of profit of unit by INR 13634222/- and over statement of profits of eligible units to that extent. Therefore, learned assessing officer made similar addition. On appeal before learned CIT - A above addition was confirmed. Therefore, assessee has challenged it before us.

115. *Learned authorized representative submitted that auditors as well as assessing officer and learned CIT - A failed to consider that due to wide variation in price of goods being transferred by division during year average method used by assessing officer to compute transfer value is not justified. It was stated that silver for division of assessee at Noida procured silver for from third-party vendors at market price, which are, further transferred to eligible units at actual cost comprising of procurement cost, processing cost, freight expenses on FIFO [1st in 1st out] basis. Therefore, it was stated that assessee has transferred goods at total cost comprising all these cost components. Merely because silver for is also sold by appellant to third-party customers at a price higher than cost at which same product was transferred to eligible unit whole*

addition has been made. It was further stated that both lower authorities made addition considering average rate of sale price to third party during relevant AR to arrive at market value of goods transferred by non-eligible unit to eligible unit. He further stated that transfer value adopted by appellant was full cost price of silver for which is procured from third party. It was further stated that only value addition that has been made by assessee is with respect to processing charges on silver foil. He therefore submitted that above addition made by learned assessing officer and confirmed by learned CIT - capital is devoid of any merit and therefore should be deleted.

116. *Learned departmental representative vehemently supported orders of lower authorities and submitted that when assessee has sold identical material to 3rd party then same is market price of goods as on that date and therefore assessee has reduced profit of non eligible unit and enhanced/increased profit of eligible unit and therefore above disallowance as rightly been made by lower authorities.*

117. *We have carefully considered rival contentions and perused orders of lower authority. Appellant has procured silver for from third-party vendors and transferred to eligible units at actual cost comprising procurement cost, processing cost, freight expenses et cetera on FIFO basis. Whereas learned assessing officer has taken average sale cost rate to 3rd party to file market value of such civil file to eligible undertaking claiming deduction u/s 80 IB/80 IC of The Act. It is apparent that silver foil item is sold to outsiders; actual price realized by assessee on sale of these items to third party is market value of product as on that date. However, assessee has purchased raw silver from third parties and as on date raw material purchased by assessee for eligible unit was fair market value of goods purchased. Assessee has also loaded actual cost on these goods with respect to freight and other expenditure. However, assessee has done processing on goods purchased from third parties therefore; assessee has provided in fact services of processing of goods. Even otherwise as stated by learned authorised representative that silver is a commodity price of which*

fluctuates every hour therefore approach of learned lower authorities in adopting average purchase price during year cannot substitute market value of silver purchased by assessee for its eligible unit. Therefore, at most processing cost of silver is service that has been transferred by non- eligible unit to eligible unit, which should have been done at market rate. At present assessee has considered process cost on actual cost basis and has loaded on price of silver. Therefore, we direct assessing officer to adopt a margin of 2% over process cost of processed silver transferred from non-eligible unit to eligible unit and to sustain disallowance of deduction to that extent only. Accordingly, ground number 7 of appeal of assessee is allowed partly to that extent."

30. *Therefore respectfully following the decision of the coordinate bench in Assessee's own case for immediately preceding year we direct the learned assessing officer to recompute the eligible profit following the order of the coordinate bench in earlier years with similar directions. Accordingly ground number 8 of the appeal is partly allowed.*

By following the above ratio laid down in Assessee's own case, we do not find merit in the in the Ground No. 6 of the Revenue. Accordingly, Ground No. 6 of the Revenue is dismissed.

16. Ground No. 7 of the Revenue is in respect of disallowance of deduction Rs. 10,05,90,398/- transfer pricing Adjustment in respect benchmarking of interest received on foreign currency loan. The said issue in Ground No. 7 has been already decided by Co-ordinate Bench of this Tribunal in Assessee's own case (supra) wherein it is held as under:-

" 44. Ground number 15 of the appeal is with respect to the transfer pricing adjustment in respect of benchmarking of interest received on foreign currency loan and the learned transfer pricing officer has made an upward adjustment of Rs. 78,019,356/-. This issue is identical to the issue decided by the coordinate bench in Assessee's own case for earlier years as under:-

"73. Now we come to ground number 14 of appeal of assessee which is against transfer pricing adjustment of INR 59551686/-. Identical addition has been made for AY 2012-13, the Id CIT (A) has considered the figures and facts for AY 2012-13, and therefore in this order for sake of simplicity, facts for that year are considered. For AY 2012-13 , In form number 3CEB filed by assessee and international transaction as reported International transaction of interest on loan with its associated enterprise DNS business AG to D 22163283/-, same was referred by learned assessing officer to The Additional Commissioner Of Income Tax, Transfer Pricing Officer - I (1), New Delhi for determination of arm's-length price. International transaction is that assessee has advanced foreign currency loan to its subsidiary in Switzerland of INR 176420000/- where rate of interest charged is only 3%. Assessee benchmarked this transnational transaction adopting CUP as most appropriate method. Learned transfer pricing officer issued a show cause notice to assessee on 20/11/2013 wherein he noted that since tested party is assessee , prevalent interest rate that could have been earned by taxpayer by advancing loan to an unrelated party in India, with weak financial health as that of associated enterprises, as there is no security provided by subsidiary against loan advanced, he proposed to charge interest at rate of 16.31% on rupee equivalent of loan advanced to associated enterprise. Assessee submitted its reply on 3/12/2013 submitting that assessee company has given foreign currency loan to its wholly owned subsidiary in Switzerland at interest of 3%. It was further contested

that where transaction was of lending money in foreign currency to its foreign subsidiaries in such a situation domestic prime lending rate would have no applicability and international rate fixed being LIBOR should be taken as benchmark rate for international transaction. Learned transfer pricing officer rejected contention of assessee and stated that assessee, in process of lending money to its subsidiary has not followed arm's-length principle by not correctly assessing risk associated with international transaction of lending of money where cost of borrowing is not relevant but return that it would have earned in India if money was not lent should be benchmark. Therefore, he adopted return associated with BB rated bonds and calculated 16.67% rate of return. He further adopted an alternative analysis and stated that as there is no credit rating available of associated enterprise, he adopted BB and D ratings for it. He further exercised powers under section 133 (6) and obtained average yield on long-term instruments from Crisil. Reply received for yield BBB grade corporate bond for 5-year period of 11.22%, which he considered for BB rated bonds yield 20% more than such bonds and accordingly held that 16.31% would be return rate. Therefore he calculated interest applying rate of interest at 16.31 percentage and computed interest that should have been charged by assessee of D 110997973/- whereas assessee has booked interest of n 22163283/- and stated that total interest chargeable would have been a 88834690/-. Accordingly, he made an adjustment of □ 88834690/- u/s 92CA of The Act and passed an order on 23/12/2013. For AY 2010-11 the addition was made of RS INR 59551686/-.

74. The learned CIT - (A) in para number 32.3 of his order has decided whole issue. He rejected contention of assessee that it is a shareholder activity rejecting that advancement of loan cannot be characterized as a shareholder activity and it is a financial transaction and required to be benchmarked. He further noted that

his view is also supported by term loan advanced which was later on to be converted into a share capital. Further with respect to argument of learned authorised representative that issue is squarely covered by decision of honourable jurisdictional High Court in case of cotton natural India private limited, he considered loan agreement and stated that as specifically currency of loan is not mentioned in loan agreement and ceiling of loan is fixed in Indian rupees and that currency of loan is in Indian rupees only and therefore foreign currency fluctuation in Indian rupee loan will not effect and therefore primary LIBOR rate or interest rate prevailing in foreign country will not apply on this loan. Accordingly, he upheld action of learned transfer pricing officer holding that Indian interest rate on such loan for benchmarking interest transaction of loan advanced is required to be taken by taking state bank of India prime lending rate for purpose of benchmarking interest rate under CUP method. Assessee aggrieved with order of learned CIT - A preferred this appeal by this ground of appeal.

75. Learned authorised representative submitted that in remand report submitted before learned CIT - A for assessment year 13-14 learned AO has accepted that loan has been advanced in foreign currency. He further referred to copy of remand report placed at page number 72 of paper book number 2. He further submitted that assessee has determined its arm's-length price at D 2 2163283/- at rate of 3% per annum inclusive of LIBOR rate applicable on loan. However learned transfer pricing officer determine ALP at INR 8 1714969/- and thereby addition of INR 59551686 has been made. He further submitted that learned transfer-pricing officer has used CUP method for benchmarking international transaction by adopting interest rate at rate of 16.31 percentages per annum by benchmarking with prime lending rate of state bank of India and making an adjustment of further 400 basis points. He submitted

that since borrowing entity is a resident of Switzerland which is a country that functions on LIBOR plus rates, hence, borrowing entity would have received a loan on LIBOR plus rates in that jurisdiction. Therefore, there should be rate applicable for calculating arm's-length price as against interest rate based on Indian prime lending rate. He stated that this is based on logic that had borrowing entity approached banks in its own country of residence they would have paid interest on LIBOR plus rates. Further, he submitted that it is a settled legal position that in case of an associated enterprise transaction interest to be charged for benchmarking transaction of loans advanced by taxpayer to its foreign associated enterprise in foreign currency should be computed on basis of London interbank offered rate (LIBOR) and not as per domestic rates as such as prime lending rate offered by Indian banks as it has no relevance on such foreign currency loans. He further relied on decision of honourable Delhi High Court in case of CIT vs Cotton naturals private limited (55 taxmann.com 523] wherein it has been held that with respect to appropriate comparable rate of interest on foreign currency dominated loan interest rate should be market determine interest rate applicable to currency concerned in which loan has to be repaid. He further stated that in impugned case assessee has advance loan to its wholly owned subsidiary in Switzerland in foreign currency and same is repayable in that foreign currency only and therefore issue squarely covered by decision of honourable jurisdictional High Court. He further referred to decision of coordinate bench in ITA number 06/07/2002/del/2015 dated 8/10/2018 wherein DCIT vs Seigwerk India private limited similar view was upheld. He further referred to decision of coordinate bench in ITA number 5816/del/2012 wherein it was held that in a case where loan was advanced in foreign currency interest rate on foreign currency loan

being qualitatively different, even if one has to see interest, that assessee should have earned one has to see interest that assessee would have earned on foreign currency loans and not rupee dominated loans. He further referred to decision of honourable Bombay High Court in CIT vs. Tata auto comp systems Ltd [374 ITR 516] wherein it is held that where assessee advance loan to its foreign associated enterprise, rate of interest was to be determined on basis of rate prevailing in country where loan had been consumed. Therefore he is submitted that benchmarking of interest, if any, should be done on basis of LIBOR instead of prime lending rate of state bank of India is all transaction with its associated enterprise have been undertaken in one currency and as such transfer pricing adjustment is not sustainable under law.

76. Learned departmental representative vehemently supported order of learned transfer pricing officer and learned CIT - A.

77. We have carefully considered rival contention and perused orders of lower authorities. Facts in facts show in present case is that assessee has given a loan to its wholly owned subsidiary in Switzerland namely DS Business AG, Switzerland at interest rate of 3% per annum. Currency of loan is Foreign currency and therefore assessee stated that Swiss LIBOR should be taken for benchmarking interest rate and not Indian rate. In remand, report submitted by learned transfer pricing officer in para number 2.1 it is clearly submitted that assessee has given loan to its associated enterprise in foreign currency and however till now such loan has not been repaid by associated enterprise. From this, it is apparent that assessee has lent money to its foreign associated enterprise in foreign currency. Honourable Delhi High Court in CIT vs. Cotton Naturals P Limited [2015 - Til - 09 - HC - Del - TP] dated

27/03/2015 has clearly held that there is no justification or cogent reason for applying prime lending rate for outbound loan transactions where Indian patent has advance loan to an associated enterprises abroad. In view of this finding of learned CIT - A is not correct that prime lending rate should be applied. Though, learned CIT - A is correctin holding that there is no stipulation about repayment currency in loan agreement, However in absence of any such clause in agreement it cannot be said that such loan is required to be repaid in Indian Rs. Only and therefore, PLR has been correctly applied where fact shows that loan has been granted in foreign currency. Honourable Gujarat High Court in 2018-TI1-169-HC-AHM-TP in R/Tax Appeal No. 687 of 2018 of PRINCIPAL COMMISSONER OF INCOME TAX RAJKOT-1 Vs JYOTI CNC AUTOMATION PVT LTD has also held that since AE is situated in France, it is most appropriate to consider mark up on basis of average speed over LIBOR charged in France. Accordingly, orders of learned lower authorities are reversed with respect to applicability of Indian interest rate on such loan for benchmarking interest transaction of loan advanced. No other arguments were advanced by either of parties on other issues involved other than that of applicability of PLR vs. LIBOR. In result ground, number 14 of appeal of assessee is allowed."

45. *The facts in present appeal shows that during the year assessee has on interest income from DS Business AG of Rs 28 67 7932/-. The assessee company has given a foreign currency loan to that company in Switzerland. The assessee has provided such loan out of its non- interest-bearing own funds and not out of the interest-bearing borrowed funds. The learned assessing officer as in previous year held that interest rate of 12.6% based on SBI +300 BSP should be at arm's-length level of interest that needs to be charged for the loan advanced by the assessee. However there is no change in the facts compared to earlier year the loan was given to its associated enterprise in Switzerland at the interest rate of 3% per annum.*

Currency of loan is a foreign currency. The assessee has benchmark the interest rate considering LIBOR. The coordinate bench in earlier year considered the agreement of the loan, the rate of interest, the currency in which the loan is to be repaid and thereafter relying on the decision of the honourable Gujarat High Court deleted the above addition. Therefore respectfully following the decision of the coordinate bench in Assessee's own case for earlier year, we direct the learned transfer pricing officer/learned AO to delete the addition of Rs 78,019,356/- on account of the arm's-length price of the interest income from its associated enterprise in Switzerland. Accordingly ground number 15 of the appeal is allowed."

By following the ratio laid down under the above order of the Tribunal in Assessee's own case, we do not find merit in the Ground No. 7 of the Revenue. Accordingly, Ground No. 7 of the Revenue is dismissed.

17. Ground No. 8 of the Revenue is in respect of disallowance of deduction Rs.17,99,03,352/- Ad-hoc Disallowance on purchase of Sandalwood oil. The said issue has also been dealt and decided by the Co-ordinate Bench of the Tribunal vide order dated 07/10/2020 in Assessee's own case wherein it is held as under:-

" 42. Ground number 14 is with respect to the ad hoc disallowance is on purchase of sandalwood oil amounting to ₹ 505,920,379/–. During the year the learned assessing officer noted that assessee has purchased sandalwood oil based fragrance from M/s Surya Vinayak industries Ltd amounting to ₹ 1,490,760,754/– which consisted of 17,410 kg of sandalwood oil compounds. In the preceding financial year 2010 – 11 the purchases was 16,702.80 kg and in financial

year 2009 – 10 purchases was 12,760 kg. AO noted that in earlier years the supplier did not have capacity to produce the goods which were sold to the assessee. Therefore the learned AO held that this was a camouflaged device of bogus sale of product at a very high rate and the proceeds were returned back to the assessee company. Therefore for the reasons discussed by the assessing officer in orders of the assessment for assessment year 2005 – 06 to 2011 – 12 (which were also reproduced in the current assessment order), as the assessee has also purchased goods from that party during the year, he made the addition by reducing the deduction u/s 80 IC of the income tax act of ₹ 505,920,379/–. The fate of the above addition in earlier years in assessee's own case was decided by the coordinate bench as Under:-

"68. Ground number 13 of appeal is against confirmation of disallowance of INR 901187656/- in respect of claim of purchase of sandalwood oil from M/s Surya Vinayak industries Ltd and Allied perfumers private limited. Brief facts of case shows that ld assessing officer has made disallowance of purchase to extent of ₹ 72,23,61,646/- from M/s. Surya Vinayak Industries Ltd. (SVIL) and ₹ 17,88,26,010/- from M/s. Allied Perfume P. Ltd. (APPL) by making reference to seized annexure A- 1/ Page 52. Ld AO has alleged that part of purchases of sandalwood oil as recorded in books of assessee are inflated and bogus and that seller M/s. Surya Vinayak Industries Ltd. and APPL does not have production capacity to supply recorded quantity of Sandalwood Oil. However, CIT(A) has restricted disallowance to ₹ 54,94,24,290/- on ground that there is no dispute regarding purchase and use of quantity for

manufacturing and sale and CIT(A) computed disallowance on basis of lowest price of other suppliers. Further, AO has made complete disallowance of purchases from APPL and part disallowance from purchases from SVIL. Relevant working of disallowance is at Page 84-85 of assessment order. AO has made such disallowance without appreciating use of actual quantity with reference to manufacturing carried out by assessee. CIT(A) has also disputed price of purchases from SVIL and APPL and has observed that purchases are inflated and adjustment was made in respect of overall purchase price based on quantity purchased from these two parties by referring to lowest price of other suppliers. However, quantum of purchase and use of it in manufacturing process was not disputed after making necessary verification of raw material used and quantity manufactures. It was corroborated from excise records. CIT(A) (A), after considering overall facts of case, held that there is no dispute regarding correctness of quantity of Sandalwood oil purchases and recorded in books of assessee and only dispute is regarding value of purchases. Accordingly, CIT(A) applied minimum purchase rate from third party to quantity of Sandalwood oil purchased from SVIL and APPL. Relevant working is at Page 297-298 of CIT(A)'s order. Disallowance was restricted to ₹ 54, 94,24,290/- as against ₹ 90,11,87,656/-. Therefore, assessee is in appeal in this ground.

69. Learned authorized representative submitted that identical issue has been considered by Hon'ble ITAT in order for AY 2005-06 to 09-10 in favour of appellant wherein Hon'ble court has held that alleged seized documents relied

upon by AO are neither incriminating in nature nor credible evidence to justify allegation of inflation of purchase price. It has been held by Hon'ble ITAT that entire story of inflated purchases is merely on basis of conjectures and there is no real evidence to establish any sort of case against appellant. It was submitted that whole basis of disallowance is based on Page No. 52 of Annexure A/1 seized during course of search on 21.01.2011 and same is year specific and it is not known as to how such document is relevant for AY 2010-11 i.e. year under consideration.BIn light of finding of Tribunal, alleged annexure A-1/ Page 52 is not relevant to AY 2010-11 and same could not be considered as basis for any addition in AY 2010-11. Further, Assessing Officer and CIT(A) has not disputed fact that entire purchases of Sandalwood Oil is fully supported from invoices issued by parties and use of same for manufacturing of final product.

Further, assessing officer was not justified in relying upon seized document Page 52 of Annexure A/1 as same is incoherent, dumb and wholly irrelevant to case of assessee.

Further, seized document relates to AY 2011-12 and as such, it has no relevance or bearing to assessment year under consideration. It is also important to note that name of assessee is nowhere mentioned in said document and it is not known as to how such document is relevant to present case. Hon'ble ITAT has specifically disputed correctness of this document and has held that no adverse inference could be drawn on basis of same.

He further submits that theory of bogus purchases and return of cash by SVIL and APPL as suggested by assessing

officer has no valid basis as assessing officer has failed to bring any evidence on record to demonstrate alleged synchronized flow of cheque and cash between assessee and these companies and as such adverse inference is merely on hypothetical basis. reference to statement of various persons, who have no direct involvement with reference to alleged annexure A/1 Page 52, is not relevance. Assessee has simply made purchases of Sandalwood Oil from SVIL and APPL, which are independent third parties, and assessee is not answerable to internal affairs of these concerns. Further, statement of third parties have not been recorded so as to establish authenticity and genuineness of alleged seized annexure A-1 page 52 and as such computerized sheet of alleged annexure is of no evidentiary value in absence of any corroboration/cross examination. It is pertinent to note that manufacturing, sales are fully reconciled and corroborated with VAT return and excise records, and as such there could be no dispute with regard to correctness of quantitative trading results. Further, there is no adverse evidence on record regarding disputing quantum of purchases of sandalwood oil and reconciliation of purchases with production. It is self evident that whole addition is merely based on inferences and bald allegations, which are not supported from any documentary evidences. In any case, once correctness of purchases recorded in books is accepted, dispute regarding valuation of it is wholly irrelevant as revenue authorities cannot sit in armchair of assessee and decided reasonableness of an expenditure. It is not case of revenue that M/s. Surya Vinayak Industries Ltd. and M/s Allied Perfumers Pvt. Ltd. are related parties or

provisions of section 80IA(8) or 80IA(10) are applicable and as such there is no ground or basis for any disallowance of purchases of Sandalwood Oil from M/s. Surya Vinayak Industries Ltd. and M/s Allied Perfumers Pvt. Ltd. keeping in view documentary evidences placed on record in form of bills, vouchers, documents showing actual receipt of material, documents in support of actual movement of goods and actual consumption in manufacture of final products, viz., Pan Masala, Tobacco and Gutka products. Even otherwise, CIT (A) has erred in applying third party minimum rate while computing value of purchase in case of SVIL and APPL. It is relevant to mention that no investigation has been carried out to demonstrate comparability of cases. There are several factors which affect price of a commodity and without making any objective comparison with regard to quality, brand, nature and type of product, there could be no ground or basis for applying data of a third party transaction. While applying minimum rate of other party, CIT (A) has ignored fact that other parties have also supplied Sandalwood Oil at different rates as per details given at page 70 of Supplementary paper book 2. Further, CIT (A) has also ignored fact that various items manufactured are of different qualities and use of different category of raw material based on business and commercial expediency and also corroborated from manufacturing of difference quality and sale price and as such mechanical application of minimum rate is highly arbitrary and irrelevant. In any case, even if purchase price of other parties is to be considered, same should be average price and not lowest price. In light of above discussion and order of Hon'ble ITAT for AY 2005-06

to 09-10, Issue stands settled in favour of appellant as lower authorities have not brought anything on record to substantiate allegation of inflated purchases particularly when seized material relied upon does not belong to year under consideration and there is no other material or finding to support such addition. There is thus no justification for disallowance of claim of purchases to extent of ₹ 54,94,24,290/- on basis of application of minimum third party purchase rate and same may kindly be deleted.

70. Learned departmental representative extensively read para number 70 – 102 of assessment order. It was stated that on perusal of annexure A – 1 seized during course of search and seizure action and also various other an action it is apparent that assessee has made bogus purchases from Messer Surya Vinayak industries Ltd amounting to INR 722361646/– and from Messer Allied perfumers private limited of INR 1 78826010 totaling to INR 901187656 in all. He further submitted that such bogus purchases have been added by learned assessing officer giving conclusive reasons. He further went on there from and continued until para number 147 of assessment order and then stated that assessee has made bogus purchases from above two companies and therefore addition has been made in hands.

71. We have carefully considered rival contentions and perused orders of lower authorities learned CIT – A has decided whole issue and held that based on all evidences gathered during search and post search proceedings in case of appellant and Florian a group of cases, he is satisfied that there are enough evidences in form of seized documents and

statement recorded during search and post search proceedings which clearly establishes that so Vinayak industries Ltd and Allied perfumery is private limited has not supplied goods namely Sandalwood oil to assessee and I have merely issued bogus bill to assessee and received cheques from assessee and paid back to assessee in cash after some adjustment in rate and apportioning excise duty. After giving this finding, he further held that Sandalwood oil is an excisable product and entered in excise registrar of perfumery compound division of assessee. He further noted that on date of such there was no discrepancy in stock of sandalwood oil found which is apparent from assessment order where assessing officer himself as mentioned that during course of search proceedings conducted sandalwood oil was found in production for being hundred KG and in managing director room wearing 208.74 KG. He further considered consumption of sandalwood oil after reducing purchases from two companies and also after incorporating quantity purchased from these two companies and compared them. He noted that if quantity purchased from these two entities are disallowed and not taken into consideration than revised yield ranges from 102.57% to 112.62 percentage of entire consumption of raw material, which gives an absurd result of finished goods production, which is exceedingly consumption. He further noted that quantity of finished product 4 KG on consumption of sandalwood oil ranges from 6.5 – 8.54 for various assessment years appears to be reasonable in variation whereas if entire quantity purchased from these 2 entities are ignored and finished product per KG consumption of sandalwood oil will range from 13.47 to

65.25 therefore he held that if quantity purchased from these 2 entities are not considered in quantitative details will give an erroneous and inconsistent results in terms of finished product ratio. He further found that views taken by him is also supported by words mentioned in seized documents annexure A – 1 and page number 42 seized from laptop of Mr. Gupta where there is a mention of adjustment of apportionment of excise duty and rate difference. Therefore, he gave a conclusive finding that purpose of these bills is just adjustment in prices. He further analyze details of purchases from all parties assessment year -wise in respect of sandalwood oil purchase and he found that average rate of alleged purchase from these 2 entities is a much higher rate compared to other undisputed parties. Therefore, he noted that purpose of mentioning quantity of goods as Central would oil (C) and sandalwood oil (SU) is just to inflate cost of sandalwood oil purchased and used for manufacturing purposes in perfumery division. He further reached at a conclusion that appellant has though purchase sandalwood oil from grey market but billing of it has been made by these two entities at higher cost. Accordingly, he held that entire quantity purchased from these two entities could not be ignored, as it will go against maintenance of quantitative records as per Central Excise rules and inconsistent results in terms of yield of finished goods. Therefore, he held that purpose of issuing bogus bill by these two entities is just to inflate purchase in amount and to increase amount of purchases in terms of rupees for sandalwood oil. Accordingly, he upheld that in fact assessee has purchased sandalwood oil from grey market, quantity of such

purchases were entered into Central Excise register however for purpose of accounting and recording it in books of accounts assessee used these two entities and obtained bogus bills from them at higher rate. However, the order of the ld CIT (A) is for the combined Assessment years for many years. He has given a finding for Ay 2011-12 however, he did not show that how this issue is related to AY 2010-11. The coordinate bench in its order in case of the assessee for the above paper has held that it pertains to Ay 2011-12. Therefore cognizance of the same can be taken only for the year Ay 201-12. There is no evidence found during the course of search that these are the transactions related to this year. The order of the coordinate bench in assessee's own case is clear on this issue with respect to which year the cognizance of these seized material would be taken.

" 28. The main seized paper on which heavy reliance is placed up on by revenue is Page No. 52 of annexure A-1 which is a statement dated 30.11.2010 where in the details of three bills dated 19.11.2010 and 26.11.2010 are given. The details of the bill show quantity, rate, and the amount. The total quantity purchased by the assessee is 650 kgs and corresponding amount is ₹ 4.64 crores. There is account statement below which gives the details of payment made up to 31.10.2010 of ₹ 6.70 crores as excess and there is two entry of rate difference and further there is an adjustment on account of excise duty and thereafter ₹ 2.04 crores is determined as amount to pay from which an amount paid by party of ₹ 10.50 crores is deducted which resulted into excess paid of ₹ 12.54 crores. Below that, there is a statement in which details of cash payment starting from

02.11.2010 to 24.11.2010 is mentioned totaling to ₹ 10.50 crores. A further details of account of SVIL and APPL is mentioned and net of it is stated to have been amount excess received of ₹ 9.49 crores which result in to amount to receive of ₹ 30436590/-. "

29. Surya Vinayak Industries in fact gave this document to Shri Rajiv Kumar who is managing Director of Dharampal Stayapal Ltd. This paper was shown to him vide question No. 13, which was replied by him by asking for some time. He further replied this question vide question No. 27. The ld AO further examined Shri Rajiv Gupta on 13.06.2011 where he has denied of having paid any excess cash to the assessee. The director of M/s. Surya Vinayak Industries Ltd was also summoned and his statement was recorded on 02.05.2011 wherein, he too have denied having received the payment other than by cheque or payment any cash in lieu of sales of material to the assessee company. The ld Assessing Officer himself has stated that the paper is dated 30.11.2010 that means the transaction in this paper are showing the transaction for the month of November 2010. The excess amount paid up to 31.10.2010 is mentioned. The balance is also shown up to 30.11.2010, therefore, it is apparent that this paper does not pertain to Assessment Year 2005-06 to 2009-10 but for Assessment Year 2011-12. None of the transaction showed in this paper pertain to the impugned Assessment Years mentioned before us. The Hon'ble Supreme Court in case of Sinhagd Technical Educational Society (Supra) has held that the incriminating material seized must pertain to assessment years in question. In that particular case the ITAT in [2011] 16

taxmann.com 101 (Pune)/[2012] 50 SOT 89 (Pune)(URO)/[2011] 140 TTJ 233 (Pune) has held in para no 9 that In the process, the AO totally missed the requirements of the law i.e. only the assessment year with the pending assessments and the assessment year with the assessment year specific incriminating documents/transactions or seized asset should only be reopened under the provisions of the first proviso to s. 153A of the Act and not otherwise. It was further held as under in para no 13 that :-

"13. From the above, it is evident that the where nothing assessment year and assessee specific incriminating "money, jewellery or other valuable article or thing or books of account or documents", the assessments for assessment years cannot be disturbed. Further, the concluded assessments should not be disturbed merely for making routine additions, which could have been otherwise done in the regular assessment and of course, the pending assessments fall under exceptions. As stated by the learned counsel point No. 9 of his note reproduced above, "nothing is seized pertaining to asst. yrs. 2000-01 to 2003-04 obviously there is no question of recording satisfaction note". On this reasoning itself, we find that the assessee has to succeed. Therefore, we do not examine the other arguments of the counsel. Otherwise, the counsel argued that the reopening of the assessment for the asst. yrs. 2000- 01 to 2001-02 is impermissible in view of the judgment of Ahmedabad Bench in the case of Vijay M. Vimawal (supra). Further, he also argued that the assessment of asst. yr. 2003-04 was actually completed under s. 143(3) on 30th March, 2006 i.e. prior to receipt of the impugned documents by the AO on

18th April, 2007, this assessment was not pending. Attending to these arguments of the counsel is superfluous and merely an academic exercise as we have upheld the applicability of the decision of the Tribunal in the case of LMJ International Ltd. (supra) for the proposition that the "where nothing incriminating is found in the course of search relating to any assessment years, the assessments for such years cannot be disturbed" and other local decision cited above. Accordingly, the additional ground raised by the assessee for all the four appeals under consideration is allowed and in favour of the assessee." The matter reached honourable Bombay High court [2015] 63 taxmann.com 14 (Bombay)/ [2015] 235 Taxman 163 (Bombay)/ [2015] 378 ITR 84 (Bombay)/ [2015] 278 CTR 144 (Bombay) where in para no 7 it is held that If there is reference made to some loose papers found and seized from his residence indicating some "on money" receipt during the admission process then above correlation and assessment year wise ought to have been established. In the circumstances, we do not think that the tribunal's order raises any substantial question of law. On further appeal before Honourable Supreme court in [2017] 84 taxmann.com 290 (SC)/ [2017] 250 Taxman 225 (SC)/ [2017] 397 ITR 344 (SC)/ [2017] 297 CTR 441 (SC) held as under:-

"15. At the outset, it needs to be highlighted that the assessment order passed by the AO on August 7, 2008 covered eight Assessment Years i.e. Assessment Year 1999-2000 to Assessment Year 2006-07. As noted above, insofar as Assessment Year 1999-2000 is concerned, same was covered under Section 147 of the Act, which means in respect of that year, there were re-assessment proceedings.

Insofar as Assessment Year 2006-07 is concerned, it was fresh assessment under Section 143(3) of the Act. Thus, insofar as assessment under Section 153C read with Section 143(3) of the Act is concerned, it was in respect of Assessment Years 2000-01 to 2005-06. Out of that, present appeals relate to four Assessment Years, namely, 2000-01 to 2003-04 covered by notice under Section 153C of the Act. There is a specific purpose in taking note of this aspect which would be stated by us in the concluding paragraphs of the judgment.

16. In these appeals, qua the aforesaid four Assessment Years, the assessment is quashed by the ITAT (which order is upheld by the High Court) on the sole ground that notice under Section 153C of the Act was legally unsustainable. The events recorded above further disclose that the issue pertaining to validity of notice under Section 153C of the Act was raised for the first time before the Tribunal and the Tribunal permitted the assessee to raise this additional ground and while dealing with the same on merits, accepted the contention of the assessee.

17. First objection of the learned Solicitor General was that it was improper on the part of the ITAT to allow this ground to be raised, when the assessee had not objected to the jurisdiction under Section 153C of the Act before the AO. Therefore, in the first instance, it needs to be determined as to whether ITAT was right in permitting the assessee to raise this ground for the first time before it, as an additional ground.

18. The ITAT permitted this additional ground by giving a reason that it was a jurisdictional issue taken up on the basis of facts already on the record and, therefore, could be raised. In this behalf, it was noted by the ITAT that as per the provisions of Section 153C of the Act, incriminating material which was seized had to pertain to the Assessment Years in question and it is an undisputed fact that the documents which were seized did not establish any co-relation, document-wise, with these four Assessment Years. Since this requirement under Section 153C of the Act is essential for assessment under that provision, it becomes a jurisdictional fact. We find this reasoning to be logical and valid, having regard to the provisions of Section 153C of the Act. Para 9 of the order of the ITAT reveals that the ITAT had scanned through the Satisfaction Note and the material which was disclosed therein was culled out and it showed that the same belongs to Assessment Year 2004-05 or thereafter. After taking note of the material in para 9 of the order, the position that emerges therefrom is discussed in para 10. It was specifically recorded that the counsel for the Department could not point out to the contrary. It is for this reason the High Court has also given its imprimatur to the aforesaid approach of the Tribunal. That apart, learned senior counsel appearing for the respondent, argued that notice in respect of Assessment Years 2000- 01 and 2001-02 was even time barred.

19. We, thus, find that the ITAT rightly permitted this additional ground to be raised and correctly dealt with the same ground on merits as well. Order of the High Court affirming this view of the Tribunal is, therefore, without any

blemish. Before us, it was argued by the respondent that notice in respect of the Assessment Years 2000-01 and 2001-02 was time barred. However, in view of our aforementioned findings, it is not necessary to enter into this controversy.

20. Ins so far as the judgment of the Gujarat High Court relied upon by the learned Solicitor General is concerned, we find that the High Court in that case has categorically held that it is an essential condition precedent that any money, bullion or jewellery or other valuable articles or thing or books of accounts or documents seized or requisitioned should belong to a person other than the person referred to in Section 153A of the Act. This proposition of law laid down by the High Court is correct, which is stated by the Bombay High Court in the impugned judgment as well. The judgment of the Gujarat High Court in the said case went in favour of the Revenue when it was found on facts that the documents seized, in fact, pertain to third party, i.e. the assessee, and, therefore, the said condition precedent for taking action under Section 153C of the Act had been satisfied.

21. Likewise, the Delhi High Court also decided the case on altogether different facts which will have no bearing once the matter is examined in the aforesaid hue on the facts of this case. The Bombay High Court has rightly distinguished the said judgment as not applicable giving the following reasons:

"8. Reliance on the judgment of the Division Bench of the High Court of Delhi reported in case of SSP Aviation Ltd. v. Deputy Commissioner of Income Tax [2012] 346 ITR 177 is misplaced. There, search was carried out in the case of "P"

group of companies. It was found that the assessee before the Hon'ble Delhi High Court had acquired certain development rights from "P" group of companies. Based thereon, the satisfaction was recorded by the Assessing Officer and he issued notice in terms of Section 153C. Thereupon the proceedings were initiated under section 153A and the assessee was directed to file returns for the six assessment years commencing from 2003- 04 onwards. The assessees filed returns for those years but disclosed Nil taxable income. These returns were accepted by the Assessing Officer, however, in respect of the assessment year 2007-08 there was a significant difference in the pattern of assessment for this year also, the return was filed for Nil income but there were certain documents and which showed that there were transactions of sale of development rights and from which profits were generated and taxable for the assessment year 2007-08. Thus, the receipt of ₹ 44 crores as deposit in the previous year relevant to the assessment year 2008-09 and later on became subject matter of the writ petition before the Delhi High Court. That was challenging the validity of notice under section 153C read with section 153A. In dealing with such situation and the peculiar facts that the Delhi High Court upheld the satisfaction and the Delhi High Court found that the machinery provided under section 153C read with section 153A equally facilitates inquiry regarding existence of undisclosed income in the hands of a person other than searched person. The provisions have been referred to in details in dealing with a challenge to the legality and validity of the seizure and action founded thereon. We do not find

anything in this judgment which would enable us to hold that the tribunal's understanding of the said legal provision suffers from any error apparent on the face of the record. The Delhi High Court judgment, therefore, will not carry the case of the revenue any further." We, thus, do not find any merit in these appeals."

Therefore as per principle enunciated by the Honourable supreme court, there has to be specific incriminating material for each assessment year assessed u/s 153A / 153C which is concluded and addition can be made based on that only.

30. Based on the page no 52 of annexure A/1 that is containing accounts as at 31/10/2010. Therefore, it relates to AY 2011-12 only. No documents were shown to us or referred to in the Assessment order shows that any incriminating material was found which even remotely shows that assessee has purchased sandalwood at over invoiced price from those parties. The rate list of material was found for the years in appeal and no attempt was made to show that the material purchased by the assessee from this party is not at the market rate prevailing on those days. Mere assertion that assessee has purchased material from this party in these years and therefore there has to be over invoicing of the purchases is a mere assertion without any material. Therefore, we do not have any hesitation to hold that In the present case the impugned seized paper does not belong to the Assessment Years involved in the impugned appeals.

31. Furthermore, with respect to the same paper it is also important to note that it is evident from that paper that Surya

Vinayak Industries have over paid the assessee than what it should have allegedly paid for over invoicing. This evident facts also runs contrary to the other finding that Surya Vinayak industries is company of not having capacity to supply so much material in para no 145 of the order. If it is so then how it could have paid the assessee over and above what is required to be paid if the goods are over invoiced. The sum over paid by that company to the appellant is not small compared to the purchases. Even circular route stated by ld AO in various para of assessment order 143 onwards also proves contrary if read with the order passed u/s 154 of the act. Therefore according to revenue assessee has reduced the profit by booking the over invoiced purchases of the eligible units, and such income is also derived from the eligible industrial undertaking and further assessee is eligible for higher deduction u/s 80 IC of the act.

32. The LD AO has stated that the companies from whom the material has been purchased are not capable of supplying that quantity of raw material. The ld CIT(A) (A) has held that the quantity details of the assessee cannot be doubted for the reason that amount of finished goods assessee has produced does not justify the lower consumption of material than what is shown by the assessee. This finding of facts is not disputed by revenue. Therefore it cannot be disputed that assessee has purchased the material. Now the issue is at what rate. If it s the case of the revenue that assessee has purchased goods at ₹ 100 But has booked purchases at ₹ 150 and received ₹ 50 back from the supplier in cash, then revenue should have brought on record the near about comparable prices of those material with reasonable

evidences. These facts could have been proved either by the availability of the material in the market or also by the production cost of the supplier. Revenue has not brought on record any such material. Most of the part of the order justifying the addition in absence of this merely remains allegations without evidences. Additions in such a manner cannot be sustained.

33. With respect to the other seized material which have been dealt with by the ld Assessing Officer are dealt with at para No. 107 of the Assessment order as under:-

"107. Certain other seized documents also confirm the fact that there is no product by the name of Sandalwood oil (C) or Sandalwood oil (SU) being supplied by M/s Surya Vinayak Industries Ltd. to M/s Dharampal Satyapal Ltd. Page No. 61-71 of Annexure A-ll seized from Perfumery Division, Okhla In these pages, there is a chart depicting purchase of various raw materials (132 in total) by DSL [Perfumery Division] for the year 2006- 07, 2007-08 and 2008-09 and suppliers thereof. The first and very important aspect of this chart is that wherever necessary, each and every item has been classified and named separately and it contains various compounds. But nowhere in this chart there is any mention of Sandalwood oil [C] and Sandalwood Oil [SU]. At S. No. 121, there is mention of 'SANDALWOOD OIL' as 'raw material'. Their suppliers are mentioned in the next column with party name and yearly quantity purchased from them. In this column there is no classification of any sandalwood oil [C] or sandalwood oil [SU]. Just one item is mentioned and that is sandal wood oil. SVIL and Kamakhya Oil Co and

other concerns are shown as their suppliers. This proves that only sandalwood oil is being supplied by SVIL. Page No.7 to 12 of Annexure A-16 of Perfumery Division is the statement of raw materials taken from the I.A.S. software which is used in the perfumery division. This statement shows the opening balance, total receipts, total consumption, closing balances, physical balance along with short/excess for the period 1.4.09 to 31.03.10. This statement is showing the date in respect of more than 150 raw materials being purchased by Perfumery Division. In this statement there is mention of only sandalwood oil and not any [C] or [SU]. In the same way page No.2 to 6 of this annexure are the statement of physical stock as on 23.03.2010 prepared by the staff of Perfumery Division. All the items of this physical stock statement dated 23.03.2010 tally with the I.A.S. statement available in page No.9 to 12 taken on 31.3.2010. But surprisingly, the sandalwood oil is not included in this statement of physical stock taken on 23.03.2010 which goes to show there was no stock of sandalwood oil present on that day, whereas the closing balance of I.A.S. statement says closing balance of 2926 Kgs. This again proves the booking of bogus purchase of sandalwood oil by M/s DSL. Page no. 72 of Annexure 14 seized from Perfumery Division of Okhla are now being referred to and discussed. On page 72 there is mention of various raw material purchases as on 31.12.2010. Item No.8 is sandalwood oil where receipt as per MD (Shri Rajiv Gupta) is 12,694 Kg and as per Accounts it is 12,894. A different of 200 Kgs is there and in the remarks column it is mentioned that details are attached. And in this context entries of Page no. 67 are being referred.

On this page bill wise detail of purchase from various parties of sandalwood oil for the period 1.4.10 to 31.12.2010 are mentioned. Page No.87 to 90 of Annexure A-11 of the Perfumery Division are now being referred to and discussed. In these pages DSL has calculated the average rate of its raw materials. In these pages also there is no mention of any raw material by the name of Sandalwood oil [C] or [SU]. What is there, is only sandalwood oil, whose average rate is mentioned at ₹ 62503/- per kg. In the same annexure in page no.83 to 86, DSL has made a chart of average rate or last rate whichever is higher as on 31.3.2010 for its raw materials. In this chart only the price of sandalwood oil is mentioned which ₹ 67,864/- per kg. and there is no [C] or [SU]. Further, page no.79 to 89 of Annexure A-15 contains the office of Form ER- 4 (Annual Return F.Y. 2008-09) which was submitted to the Excise Department. In annexure I (page No.84) information relating to major purchase of raw materials for 2008-09 is given. It contains only one item and that is SANDALWOOD OIL, quantity purchased is shown at 17,066 Kgs valuing Rs.l 18,69,74,659/-. And th-is includes all the purchases made from SVIL, APPL and Kamakhya Oil Co. and others. Annexure II [page 82 to 83] contains the detail of finished goods. Finished goods are 39 in number and value there of is declared at ₹ 142,92,20,822/-. It is surprising to see that out of Rs.l 42.00 crores of sale, the most expensive ingredient is sandalwood oil and value thereof is ₹ 118.00 crores"

34. On reading of the above paragraph the main contention of the ld Assessing Officer is that there is no product by the name of sandalwood oil (C) or Sandalwood Oil (U) being

supplied by Surya Vinayak Industries ltd to M/s. Dharampal Stayapal Ltd (assessee). The page NO. 226 of Annexure 11, which is also the statement of physical stock as on 23.03.2011, does not fall into the assessment years in the above appeal. Further page NO. 72 of Annexure A-14 also pertain financial year 01.04.2010 to 31.12.2010. The central Excise Return Filed in Form NO. ER-1 cannot be said to be incriminating material, as it does not show any escapement of income involved in those papers. Hon'ble Supreme Court Sinhgad Technical & Education society (supra) in the para No. 18 has endorsed the reasoning given by the coordinate bench stating it to be logical and valid that incriminating material, which was seized, had to pertain to the Assessment Years in question and the documents seized must established any correlation document-wise with the Assessment Years involved. From the above reading of the documents, it is apparent that none of the seized documents belongs to the Assessment Years 2005- 06 to 2009-10. Even otherwise, without commenting whether they are incriminating or not, it does not pertain to the assessment years involved. The ld CIT DR could not show us document, which pertained to the Assessment Year 2005-06 to 2009-10. As none of the documents seized during the course of search are shown to us pertaining to the Assessment Year 2005-06 to 2009-10, we are of opinion that all the additions made by the ld Assessing Officer are not based on incriminating documents found during the course of search, hence they are not sustainable."

72. Therefore, the coordinate bench has given a categorical finding that this seized document does not belong to AY

2010-11 but for Ay 2011-12. There is no material shown to us by the LD CIT DR, which authorizes us to impute the seized papers pertaining to later years for making addition in the earlier years. Revenue has also not initiated any redressal mechanism provided in the act. No reasons are given by the ld AO or ld CIT (A) to extrapolate those seized documents for AY 2010- 11. The findings of ld CIT (A) are also for Ay 2011-012 and for the reason without application of mind that whether such seized documents are relevant for other AYs other than AY 2011-12, he confirmed the additions for those years. The coordinate bench has given a categorical finding that those papers are pertaining to AY 2011-12 only. We have also taken cognizance of those papers in ASSESSMENT YEAR 2011-12 and upheld addition on those papers n appeal of assessee for that year.

Therefore, in view of above facts, no addition is warranted in this AY on the basis of the seized papers Accordingly, ground number 13 of appeal of assessee is allowed.'

43. As both the parties confirmed that there is no change in the facts and circumstances of the case, respectfully following the decision of the coordinate bench in assessee's own case, we direct the learned assessing officer to delete the disallowance of deduction claimed u/s 80 IC of the income tax act by ₹ 505,920,379/–. Accordingly ground number 14 of the appeal is allowed."

By respectfully following the order of the Coordinate Bench(supra), we do not find merit in the Ground No. 8 of the Revenue. Accordingly, Ground No. 8 of the Revenue is dismissed.

18. Ground No. 9 & 10 are general in nature which requires no adjudication.

19. In the result, the Appeal filed by the Revenue is dismissed.

Order pronounced in the open court on : **02 /09/2022.**

Sd/-	**Sd/-**
(G. S. PANNU)	**(YOGESH KUMAR U.S.)**
PRESIDENT	**JUDICIAL MEMBER**

Dated : 02/09/2022

R.N

Copy forwarded to :

1. Appellant
2. Respondent
3. CIT
4. CIT (Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI